Supreme Court, U.S.
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IN THE
Supreme Court of the United States

FRANKLIN SAVINGS CORPORATION AND
FRANKLIN SAVINGS ASSOCIATION,
Petitioners,

v.

UNITED STATES OF AMERICA AND
FEDERAL DEPOSIT INSURANCE CORPORATION,
as successor-in-interest to the
Resolution Trust Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. If a government agency's conduct violates the agency's mandate, should the government be shielded from liability under the discretionary function exception to the waiver of sovereign immunity in the Federal Tort Claims Act?

2. Did the Tenth Circuit's decision conflict with this Court's pronouncement in *Winstar* that the government is subjected to the law generally applicable between private individuals when the government engages in non-governmental activity by entering the domain of commerce?

3. Did the Tenth Circuit erroneously refuse to consider on appeal the general waiver of sovereign immunity under Section 106 of the Bankruptcy Code by ignoring the settled legal principle that the issue of jurisdiction is never waived?

PARTIES TO THE PROCEEDING

Petitioner Franklin Savings Corporation is the parent corporation of Petitioner Franklin Savings Association.

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PETITION FOR A WRIT OF CERTIORARI

Franklin Savings Corporation ("FSC") and Franklin Savings Association ("FSA") respectfully petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Franklin Savings Corp.; Franklin Sav. Ass'n v. United States of America; Federal Deposit Insurance Corp.*, No. 97-3220, 1999 WL 270402 (10th Cir. May 4, 1999). The opinion of the district

court in *Franklin Sav. Corp. v. United States* is reported at 970 F. Supp. 855 (D. Kan. 1997).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on May 4, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Federal Tort Claims Act (28 U.S.C. §§ 2674 and 2680(a)) ("FTCA"), liability of the United States for negligent or wrongful acts or omissions (28 U.S.C. § 1346(b)), Financial Institutions Reform, Recovery and Enforcement Act (12 U.S.C. § 1821(d)), amendment of the pleadings to show jurisdiction (28 U.S.C. § 1653), and provisions of the Bankruptcy Code relating to waiver of sovereign immunity (11 U.S.C. § 106) are set forth in the Appendix to this Petition.

STATEMENT OF THE CASE

FSC and FSA sued the United States of America for damages caused by the conduct of the Resolution Trust Corporation ("RTC") in liquidating FSA's business. The liquidation occurred while the RTC was Conservator of FSA and while it was acting under an Order of the Office of Thrift Supervision ("OTS") not to liquidate FSA.

Jurisdiction for the claims of FSC and FSA are based on: (i) a waiver of sovereign immunity under the Federal Tort Claims Act;[1] (ii) a waiver of governmental

[1] The issue relating to the FTCA claim is whether the claim is barred by the discretionary function exception to that Act. Petitioners' Second Amended Complaint alleges that the RTC's conduct

immunity resulting from non-governmental activity of an agency operating in the domain of commerce; and (iii) a waiver of sovereign immunity under Section 106 of the Bankruptcy Code, since the government has filed claims in FSC's bankruptcy case.

The fundamental question involved in this case is whether the RTC retains sovereign immunity for the conduct alleged by FSC and FSA in their Second Amended Complaint.

A. Background

On February 15, 1990, M. Danny Wall, then the Director of the OTS, ordered that FSA be placed into conservatorship (the "Order"). The Order appointed the RTC "as conservator for the Association, *not for the purpose of liquidation* . . . [emphasis added]." Additionally, the statute under which the RTC was appointed Conservator gave the RTC power to carry on the business of FSA (12 U.S.C. § 1821(d)(2)(D)), but did not grant the RTC the power it would have had as Receiver to liquidate and realize on the assets of FSA's business under 12 U.S.C. § 1821(d)(2)(E) (the "Statutory Provisions").

During the course of FSA's conservatorship, FSC filed a Chapter 11 proceeding in the United States Bankruptcy Court for the District of Kansas. In subsequent litigation between FSC and the RTC over tax refunds, the bankruptcy court found that just fifteen days before the seizure "FSA capital, according to generally accepted accounting principles, was $388,519,213." *In re Franklin Sav. Corp.*, 159 B.R. 9, 25 (Bankr. D. Kan. 1993) (Finding of Fact No. 80), *aff'd*, 182 B.R. 859 (D. Kan. 1995). That

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violated its mandate by liquidating FSA's business, and, therefore, such conduct is not protected by the discretionary function exception.

amount was in excess of FSA's regulatory capital requirements.

After its appointment, the RTC exercised complete and absolute control over FSA and its affairs. In functioning as Conservator, the RTC was not acting in a regulatory function, as the OTS was still FSA's regulator. Rather, the RTC was functioning in the capacity of an operator of a thrift, which is a private capacity rather than a governmental function.

Notwithstanding the provisions of the Order and the Statutory Provisions mandating operation of the business of FSA and prohibiting its liquidation, the RTC immediately ceased all of FSA's income-generating activities while continuing virtually all of FSA's administrative costs:

1. The RTC ceased making loans.
2. The RTC ceased advertising and competing for deposits.
3. The RTC ceased acquiring assets with a yield higher than the cost of funds to purchase those assets.
4. The RTC ceased hiring new personnel to engage in income-producing activities and, instead, put on seminars on how the existing employees could get jobs at other places.
5. The RTC ceased following generally accepted accounting principles relating to a going concern.
6. The RTC sold FSA's entire mortgage servicing business.

While the RTC dismantled the income-generating aspects of the business, the RTC retained most of FSA's administrative costs.

By July 16, 1992, the RTC had wiped out FSA's entire $388,519,213 net worth, and FSA was insolvent. The

RTC was then appointed "Receiver," but by then the business of FSA was gone, and nothing remains. The value of the institution and its business had been destroyed in liquidation during the time the RTC was obligated to operate the business, conserve it, and not to liquidate it.

Various government agencies filed proofs of claim in the FSC Chapter 11 proceeding. Specifically, the government, in its various agency guises, has filed the following proofs of claim:

a. Claim No. 21 by the OTS for $271,871,670.00 filed on November 4, 1991;

b. Claim No. 22 by the RTC for $10,472,547.00 filed on December 4, 1991, subsequently amended to $1,000,000; and

c. Claim No. 37 by the Internal Revenue Service for $191,794,697.55 filed on October 24, 1995, subsequently amended to $7,096,121.87.

These claim filings engendered a waiver of sovereign immunity pursuant to Section 106 of the Bankruptcy Code, 11 U.S.C. § 106, thereby giving rise to an independent basis for jurisdiction outside of the FTCA.

B. Proceedings Below

On July 26, 1991, FSC filed its Chapter 11 case in the United States Bankruptcy Court for the District of Kansas. Thereafter, FSC submitted its administrative claim to the RTC for damages in tort pursuant to 28 U.S.C. § 2675, which claim was denied by the RTC on August 10, 1992. On January 4, 1993, FSC and FSA filed suit in the bankruptcy court against the United States under common law and under the FTCA, asserting claims for negligence, breach of fiduciary duty, and violation of its mandate as Conservator not to liquidate FSA. The United States District Court for the District of Kan-

sas withdrew reference of the action from the bankruptcy court, and the case was lodged in the district court. Thereafter, FSC and FSA filed their Second Amended Complaint in the district court (the "Second Amended Complaint").

On June 17, 1997, the district court granted the government's Motion to Dismiss under Rule 12(b)(6) on the basis of lack of jurisdiction by virtue of the government's sovereign immunity. FSC and FSA appealed to the Tenth Circuit. The Tenth Circuit affirmed the dismissal, concluding, *inter alia*, that the government's sovereign immunity was not waived (i) under the FTCA because of application of the discretionary function exception, (ii) under *Winstar* and the government's involvement in a non-governmental activity, or (iii) under Section 106 of the Bankruptcy Code.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRIOR RULINGS THAT CONDUCT BY AN AGENCY VIOLATING THE AGENCY'S MANDATE IS NOT PROTECTED BY THE DISCRETIONARY FUNCTION EXCEPTION.

The RTC, by the Order and the Statutory Provisions, was given a specific mandate: to conserve FSA's business and not liquidate it. FSC and FSA have alleged that immediately upon assumption of its conservatorship duties, the RTC began a course of conduct that constituted a liquidation of FSA's business.

In *United States v. Gaubert*, 499 U.S. 315, 324, 111 S. Ct. 1267, 113 L. Ed. 2d 335, 347 (1991), and in *Berkovitz v. United States*, 486 U.S. 531, 536, 108 S. Ct. 1945, 100 L. Ed. 2d 531, 540-41 (1988), this Court stated that there is no public policy in favor of immunity

for an agency of the government that violates a specific mandate. If a specific mandate exists, there is no room for discretion, and the discretionary function exception to the FTCA does not apply.

The Tenth Circuit, in sustaining an order of dismissal under Fed. R. Civ. P. 12(b)(6), held that FSC and FSA are not entitled to a day in court to prove their allegation that the conduct involved violated the RTC's mandate and was not within the type of conduct that the discretionary function exception was intended to shield. The effect of the Tenth Circuit's ruling is that an agency which may clearly exercise discretion in carrying out its mandate may never be liable for conduct that violates that mandate, because a plaintiff can never get to trial.

The error of the Tenth Circuit lies in its focusing on concerns over the "intent" of the RTC officials. The Tenth Circuit mistakenly read *Gaubert* to ban any proceedings where the subjective intent of the agency's officers may arise. The Tenth Circuit's holding is premised on its assumption that FSC and FSA must prove bad intent or scienter in order to prove that the RTC violated its mandate. *Gaubert*, however, noted that the focus is *not* on intent, but on the agency's conduct, and whether that conduct was within the discretion of the actor. If it was, aggrieved parties are tossed out of court; if not, they may try their lawsuits.

The instant action focuses on the conduct of the agency involved. FSC and FSA will prove that the RTC's conduct was a direct violation of its mandate and, therefore, was not susceptible to discretion. Although the Tenth Circuit opinion concentrates on some of the more specific, detailed violations of mandatory rules, the real gist of FSC's and FSA's claims is that the overall, cumulative effect of the RTC's conduct is a liquidation. In the 29 months of conservatorship, the RTC did not compete for

deposits and never made a single loan; rather than a savings and loan association, FSA had become a "*NO SAVINGS, NO LOAN*" company being systematically liquidated by the RTC. To deny FSC and FSA the right to prove conduct amounting to disobeying a direct mandate is to deny all aggrieved parties the right to challenge conduct that violates statutory, administrative, or regulatory mandates.

The Tenth Circuit ruling promotes a policy of shielding renegade conduct by powerful government agencies, diverges dramatically from the clear principles established by prior precedents of this Court, and undermines the limited nature of the exception to the waiver of sovereign immunity under the FTCA. The discretionary function exception as interpreted by this Court does not apply when a statute, regulation, or policy specifically mandates conduct because the actor has no discretion in following or not following such directive:

> The determination of whether the discretionary function exception bars a suit against the Government is guided by several established principles. This Court stated in *Varig* that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies in a given case." In examining the nature of the challenged conduct, a court must first consider whether the action is a matter of choice for the acting employee. This inquiry is mandated by the language of the exception; conduct cannot be discretionary unless it involves an element of judgment or choice. [Citation omitted.] *Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.*

Berkovitz v. United States, 486 U.S. 531, 536, 108 S. Ct. 1945, 100 L. Ed. 2d 531, 540-41 (1988) (emphasis added).

Berkovitz teaches that the discretionary function exception will not protect the government from a claim based on violation of a statute, regulation, or policy specifically prescribing a course of action for a government employee to follow. The *Berkovitz* analysis was applied specifically to the exercise of regulatory power in the arena of financial institutions in *United States v. Gaubert*, 499 U.S. 315, 324, 111 S. Ct. 1267, 113 L. Ed. 2d 335, 347 (1991), where this Court stated:

> Under the applicable precedents, therefore, if a regulation mandates particular conduct, and the employee obeys the direction, the Government will be protected because the action will be deemed in furtherance of the policies which led to the promulgation of the regulation. [Citation omitted.] If the employee violates the mandatory regulation, there will be no shelter from liability because there is no room for choice and the action will be contrary to policy.

Berkovitz and *Gaubert* specifically limit the protection of the government under the discretionary function exception to decisions involving "the permissible exercise of policy judgment." *Berkovitz*, 486 U.S. at 539, 100 L. Ed. 2d at 543. It is certainly true, as this Court observed in *Gaubert*, that the management and operation of a financial institution entails the exercise of discretion on a regular and ongoing basis. The exercise of that discretion, however, is limited to "permissible" choices. In circumstances where the exercise of discretion is otherwise appropriate, the government cannot exercise that discretion to violate a statute, regulation, or policy governing government action. Thus, in *Berkovitz*, this Court held that the government agency "has no discretion to issue a license without first receiving the required test data; to do so would violate a specific statutory and regulatory directive." 486 U.S. at 542-43, 100 L. Ed. 2d at 544-45. Simi-

larly, in this case of the imposition of a conservatorship on FSA pursuant to an Order stating that it is "not for the purpose of liquidation," the government had no right to exercise its discretion in such a manner that resulted in the liquidation of the institution's business.

The Tenth Circuit disregarded the limitations to the discretionary function exception as established by this Court in *Berkovitz* and *Gaubert* in sanctioning the government's de facto liquidation of FSA's business during the conservatorship. The decision of the Tenth Circuit turns the statute on its head by expanding the heretofore limited nature of the discretionary function exception in a manner which permits the government to violate a mandate in circumstances where any exercise of discretion is allowable in carrying out that mandate. In both *Berkovitz* and *Gaubert*, this Court stated that the initial inquiry is whether the challenged conduct involves the permissible exercise of policy judgment. Because of the specific mandate in both the Order and the Statutory Provisions, the RTC in the present case had no leeway to engage in a course of conduct to liquidate FSA's business.

The Tenth Circuit erroneously reasoned that discretion was involved in concluding that the RTC could liquidate the entire business of FSA if it had the discretion to liquidate a single asset; *ergo* everything the RTC did was the exercise of discretion. The Tenth Circuit's decision puts not making a particular loan on a par with making *no* loans. Obviously, the RTC not making a particular loan should not be second-guessed in the courts, but making no loans and not competing for deposits is not merely a discretionarily inappropriate way of conserving; it is a liquidation of FSA's business. When one analyzes the "nature of the conduct" as charged in *Gaubert*, the totality of the RTC's conduct clearly demonstrates a violation of the no-liquidation mandate. The

purpose or intent of the individual RTC actors is not at issue here; their conduct is. FSC and FSA do not seek to ascertain whether the particular officials involved were dealing in bad faith or had an evil motive. Whatever their intent, the plain and simple fact is that an Order was issued and the RTC violated it. Engaging in a course of conduct that liquidated FSA's business was simply not a choice available to the RTC.

The Tenth Circuit's rogue interpretation of the FTCA allows the discretionary function exception to supersede, indeed countermand, the mandate of a statute, regulation, or policy, a result specifically proscribed by this Court in *Berkovitz* and *Gaubert*. FSC and FSA alleged that the government completely disregarded the explicit prohibition against liquidation of FSA in the conservatorship, a situation which vitiates the effect of the discretionary function exception. "When a suit charges an agency with failing to act in accord with a specific mandatory directive, the discretionary function exception does not apply." *Berkovitz*, 486 U.S. at 544, 100 L. Ed. 2d at 546. As in *Berkovitz*, FSC and FSA have also asserted violations of specific, mandatory policies and are not required, upon a motion to dismiss, to prove their factual allegations. *See Berkovitz*, 486 U.S. at 547, 100 L. Ed. 2d at 547. And, like *Berkovitz*, because FSC and FSA "may yet show, on the basis of materials obtained in discovery or otherwise, that the conduct challenged here did not involve the permissible exercise of policy discretion, the invocation of the discretionary function exception to dismiss [the claims of FSC and FSA] was improper." *Id.* at 547-48, 100 L. Ed. 2d at 548.

This Petition for Writ of Certiorari should be granted because the opinion below not only conflicts with the opinions of this Court in *Berkovitz* and *Gaubert*, but it also sets a very dangerous precedent. The Tenth Circuit

holding allows a government agency the unrestricted, unchecked, absolute power to engage in conduct that violates both the Order appointing it and the Statutory Provisions under which it served, a concept inimical to our system of government and justice.

This Court has held that there is no immunity where a mandate is violated. The Tenth Circuit, on the other hand, has held that even where the mandate has been violated, the aggrieved party should not be given a day in court to prove it because the government might be opened up to lawsuits that are unfounded as well as to lawsuits stating meritorious claims. The Tenth Circuit eliminates any remedy for conduct alleging a violation of the agency's mandate because, in the end, according to the Tenth Circuit, it is "better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation." *Franklin Savings Corp.; Franklin Sav. Ass'n v. United States of America; Federal Deposit Insurance Corp.*, No. 97-3220, slip op. at 38 (10th Cir. May 4, 1999).

The regulatory power of the government and the limitation of that power is an issue of paramount significance and national implication. While the banking industry in this country is rooted in a long-standing tradition of governmental scrutiny and regulation, there are limits to the exercise of that regulatory power, including the right of institutional owners to seek redress when government conduct exceeds the limit of authority granted to the government. The ruling of the Tenth Circuit eviscerates the checks and balances against government power over financial institutions, thereby undermining confidence in the banking system as a whole.

An agency that can violate its mandate with impunity because the courts will not allow agency actions to be

examined is a dangerous creature. Much has already been written about the abuses of the RTC. Allowing such an agency to go unchecked at present will not bode well in guiding the conduct of other federal agencies in the future. If the Tenth Circuit ruling is allowed to stand, regulatory conduct of the government will not be subject to any restraint. The Tenth Circuit has, in effect, created a despot. If the agency in this case is permitted to function as a despot in the Tenth Circuit, it bodes poorly not only for the banking industry, but for all industries whose regulatory agencies will cite *Franklin* to support their immunity for discretionary conduct which violates statutes, rules, and regulations.

The Petition should be granted so that the Court may restore the remedy provided by the FTCA against agencies whose conduct runs amok in violation of their mandate.

II. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH THIS COURT'S PRONOUNCEMENT THAT THE GOVERNMENT IS NOT SHIELDED FROM LIABILITY WHEN IT DEPARTS FROM ITS GOVERNMENTAL FUNCTIONS AND ENTERS THE DOMAIN OF COMMERCE BY OPERATING AS A PRIVATE CITIZEN.

The Tenth Circuit decision conflicts with the pronouncement of this Court in *Winstar* that the government retains no immunity from liability and is subjected to the law generally applicable between private individuals when the government engages in non-governmental activity by entering the domain of commerce. In *United States v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964, 1004 n.39 (1996), this Court noted that "when the United States 'comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals

there'," quoting *Cooke v. United States*, 91 U.S. 389, 398, 23 L. Ed. (1875). The government in *Winstar* was involved in commerce as a party to contracts with financial institutions concerning the accounting treatment of supervisory goodwill. This Court held that the United States was liable to the financial institutions for a breach of contract on the supervisory goodwill treatment.

The RTC, as Conservator of FSA, functioned as director and officer of FSA and, in so doing, was even more involved in commerce than was the government in *Winstar*. *See* 12 U.S.C. § 1821(d)(2) (RTC succeeded to director and officer positions). While functioning as the sole director and operating chief of FSA, the RTC was directed to operate a stockholder-owned, for-profit business in a private capacity; as such, the RTC is held to the same fiduciary duty that governs individuals as directors and officers of a financial institution, including a very strict fiduciary duty under applicable state law. *See, e.g., RTC v. Fleischer*, 890 F. Supp. 972, 979 (D. Kan. 1995); *RTC v. Scaletty*, 810 F. Supp. 1505, 1513 (D. Kan. 1992); *Miller v. Foulston, Siefkin, Powers & Ebarhardt*, 246 Kan. 450, 467 (1990). Furthermore, the activity of the RTC as Conservator of FSA in functioning as director and officer of FSA was non-governmental. *See FDIC v. Carter*, 701 F. Supp. 730, 736-37 (C.D. Cal. 1987) (FDIC performs proprietary tasks when managing assets of a bank and can be held liable for negligently performing such proprietary tasks); *Turner v. Small Business Administration*, 84 F.3d 1294 (10th Cir. 1996) (FDIC is not considered part of the government for bankruptcy setoff when it acts in its "distinctive private capacity" as a receiver [clearly a Conservator who is charged with operating a business is even more in a "distinctive private capacity" than a Receiver who is charged with liquidating that business]).

Because the RTC as Conservator of FSA was performing private, proprietary tasks, the United States and the FDIC are not protected by the discretionary function exception to the FTCA's waiver of sovereign immunity. The purpose of the FTCA discretionary function exception is "to preclude any possibility that [the FTCA] might be construed to authorize suit for damages against the Government growing out of authorized activity, such as a flood control or irrigation project, where no negligence on the part of any government agent is shown, and the only ground for the suit is the contention that the same conduct by a private individual would be tortious." *Dalehite v. United States*, 346 U.S. 15, 30, 73 S. Ct. 956, 97 L. Ed. 1427, 1437-38 (1953). This Court further observed:

> The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts *of a governmental nature or function.*

346 U.S. at 27-28, 97 L. Ed. at 1436 (emphasis added). "However, the common-law torts of employees of regulatory agencies would be included within the scope of [the FTCA waiver of sovereign immunity] to the same extent as torts of non-regulatory agencies." 346 U.S. at 29 n.21, 97 L. Ed. at 1437 n.21; *Berkovitz v. United States*, 486 U.S. 531, 538 n.4, 108 S. Ct. 1945, 100 L. Ed. 2d 531, 542 n.4 (1988), quoting H.R. Rep. No. 1287, 79th Cong., 1st Sess., 6 (1945).

In *Indian Towing Co. v. United States*, 350 U.S. 61, 68-69, 76 S. Ct. 122, 100 L. Ed. 48, 55-56 (1955), this Court held that the FTCA "was designed . . . to compensate the victims of negligence in the conduct of gov-

ernmental activities in circumstances like unto those in which a private person would be liable . . . ." *Indian Towing* presented circumstances which inform this case:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

350 U.S. at 69, 100 L. Ed. at 56.

In this case, the government undertook the responsibility of operating FSA when it placed the institution into a conservatorship. Having exercised its discretion to operate FSA, the government, as in *Indian Towing*, "was obligated to use due care" in the operation of the institution. The government, however, completely failed to adhere to the standard of care under applicable state law to conserve and preserve FSA's business. The breach of fiduciary duty of the RTC as director and officer of a financial institution constitutes a common law tort and a non-governmental activity. *See, e.g., RTC v. Scaletty*, 810 F. Supp. 1505, 1513 (D. Kan. 1992); *FDIC v. Carter*, 701 F. Supp. 730, 736-37 (C.D. Cal. 1987). Such a common law tort, according to this Court, is included within the scope of the waiver of sovereign immunity of the FTCA and does not fall within the discretionary function exemption. *Dalehite*, 346 U.S. at 29 n.21, 97 L. Ed. at 1437 n.21; *Berkovitz*, 486 U.S. at 538 n.4, 100 L. Ed. 2d at 542 n.4. Thus, the FTCA discre-

tionary function exception is not applicable to FSC's and FSA's claim against the United States and the FDIC based on the RTC's tortious activity as Conservator of FSA, since such activity constituted a non-governmental activity in commerce. For this reason, the Petition should be granted.

III. THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW REFUSED TO CONSIDER, ON APPEAL, THE ALTERNATIVE BASIS FOR WAIVER OF SOVEREIGN IMMUNITY UNDER SECTION 106 OF THE BANKRUPTCY CODE.

The Tenth Circuit erroneously refused to consider, on appeal, the general waiver of sovereign immunity under Section 106 of the Bankruptcy Code, ignoring settled legal principle that the issue of jurisdiction is never waived.

This Court long ago established the principle that questions of jurisdiction may be entertained at any time in the litigation process. "Objections to the jurisdiction of the court below, when they go to the subject-matter of the controversy and not the form merely of its presentation or to the character of the relief prayed, may be taken at any time. They are not waived because they were not made in the lower court." *Mississippi and Rum River Boom Co. v. Patterson*, 98 U.S. 403, 25 L. Ed. 206, 207 (1879). *See also Gainesville v. Brown-Crummer Invest. Co.*, 277 U.S. 54, 59, 48 S. Ct. 454, 72 L. Ed. 781, 783 (1928) (emphasis added) ("Of course a question of jurisdiction cannot be waived. Jurisdiction should affirmatively appear, and *the question may be raised at any time.*"); *Matson Navigation Co. v. United States*, 284 U.S. 352, 359, 76 L. Ed. 336, 342 (1931) ("As the want of jurisdiction is of the subject matter, it may be considered and appropriate judgment given at any stage of the proceedings, either here or below."); *Edelman v. Jordan*, 415 U.S. 651, 678, 94 S. Ct. 1347, 39 L. Ed. 2d 662, 681

(1974) ("the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court."); *Alabama v. Pugh*, 438, U.S. 781, 57 L. Ed. 2d 1114, 98 S. Ct. 3057 (1978). In deciding that it retains discretion not to consider the jurisdictional issue of Section 106 with respect to the government's sovereign immunity claim, the Tenth Circuit departs from long-standing holdings of this Court and injects new ambiguities into the settled concept regarding required review of the issue of jurisdiction at all levels of the proceedings.

The issue at stake in this appeal is a pristine legal question regarding the jurisdiction of the district court arising from the waiver of any sovereign immunity of the government under Section 106 to the claims asserted by FSC and FSA in the Second Amended Complaint. The Section 106 argument entails "an issue which is purely one of law and does not depend on an inadequately developed factual record." *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1064-65 (9th Cir. 1996). The refusal of the Tenth Circuit to visit the jurisdictional issue arising under Section 106 is contrary to legal precedent in this Court. *See McCullough v. Marineros de Honduras*, 372 U.S. 10, 16, 83 S. Ct. 671, 9 L. Ed. 2d 547, 552 (1963) ("We are not of course precluded from reexamining the jurisdiction of the District Court in Sociedad's action, merely because no challenge was made by the parties."). The issue of jurisdiction as affected by the potential existence of sovereign immunity has been addressed by this Court, which concluded that "the failure of the State to raise the defense of sovereign immunity in the District Court would not have barred Iowa from raising that issue in this Court . . . ." *Sosna v. Iowa*, 419 U.S. 393, 396, 95 S. Ct. 553, 42 L.Ed.2d 532, 538 (1975). *See also In re Univ. Medical Center*, 973 F.2d 1065, 1085 (3d Cir. 1992) ("Be-

cause a waiver of sovereign immunity is a prerequisite for jurisdiction [citation omitted], we must decide the issue of the Department's sovereign immunity, though it was neither presented nor considered below."). The ruling of the Tenth Circuit stands in stark contrast to the well-established concept that jurisdiction is not a waivable issue.

The Tenth Circuit ruling also runs afoul of holdings in other circuits. *See Shendock v. Director, OWCP*, 893 F.2d 1458, 1461 n.7 (3d Cir. 1990) ("Of course, jurisdiction is never waived; indeed this Court can always raise it on its own motion, and we are continuously required to discern whether we have jurisdiction over a case or controversy before ruling upon its merits."); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1194 n.2 (9th Cir. 1988) ("It is elementary that the subject matter jurisdiction of the district court is not a waivable matter and may be raised at any time by one of the parties, by motion or in the responsive pleadings, or *sua sponte* by the trial or reviewing court."); *Booth v. United States*, 990 F.2d 617, 620 (Fed. Cir. 1993) ("A party, or the court *sua sponte*, may address a challenge to subject matter jurisdiction at any time, even on appeal."); *Ligurotis v. Whyte*, 951 F.2d 818 (7th Cir. 1992) (court of appeals possessed jurisdiction to determine whether district court correctly held that it was without jurisdiction).

The Ninth Circuit has clearly and properly determined that the reviewing court's responsibility to ascertain the existence of jurisdiction of the trial court extends to an examination and consideration of any basis for jurisdiction which arises out of the allegations in the complaint:

> The only statutory provision under which the complaint asserted subject matter jurisdiction is 28 U.S.C. § 1343 (granting subject matter jurisdiction over cer-

> tain actions seeking protection of civil rights and elective franchise). The district court considered no other ground for subject matter jurisdiction. However, in determining the existence of subject matter jurisdiction, we are not limited to the jurisdictional statutes identified in the complaint. "[T]he court may sustain jurisdiction when an examination of the entire complaint reveals a proper basis for assuming jurisdiction other than one that has been improperly asserted . . . ." 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1206 (1969); *see Williams v. United States*, 405 F.2d 951, 954 (9th Cir. 1969) ("If facts giving the court jurisdiction are set forth in the complaint, the provision conferring jurisdiction need not be specifically pleaded."). Therefore, we will consider jurisdiction under 28 U.S.C. § 1351 (granting subject matter jurisdiction over civil actions against consuls, vice consuls, and members of a diplomatic mission) and 28 U.S.C. § 1330 (granting subject matter jurisdiction over certain actions against foreign states) as well as jurisdiction under 28 U.S.C. § 1343.

Gerritsen v. de la Madrid Hurtado, 819 F.2d 1511, 1515 (9th Cir. 1987). *See also Detroit Pension Fund v. Prudential Securities*, 91 F.3d 26, 29 (6th Cir. 1996) ("Where there is a challenge on appeal to the subject matter jurisdiction of the district court, this court may take notice of other bases for jurisdiction."). *Cf. Allen v. Board of Elections*, 393 U.S. 544, 554, 89 S. Ct. 817, 22 L. Ed. 2d 1, 10 (1969) ("Where all the facts are undisputed, this Court may, in the interests of judicial economy, determine the applicability of the provisions of that Act, even though some specific sections were not argued below."); *A.I. Trade Finance, Inc. v. Petra Bank*, 989 F.2d 76, 80 (2d Cir. 1993) ("Arguments made on appeal need not be identical to those made below if they involve only questions of law and additional findings of fact are not required.").

In the Second Amended Complaint, FSC and FSA asserted the fact that FSC filed a Chapter 11 proceeding under the Bankruptcy Code, thereby giving rise to the applicability of the provisions of the Bankruptcy Code to this action. Section 106 of the Bankruptcy Code is therefore implicit in this action even though not directly cited in the Second Amended Complaint. Faced squarely with the issue of subject matter jurisdiction posed by the discretionary function exception to the waiver of sovereign immunity under the FTCA, the district court should have identified Section 106 as a basis for sustaining jurisdiction and the Tenth Circuit erred in finding a waiver of the Section 106 issue. *See Kamen v. Kemper Financial Services,* 500 U.S. 90, 99, 111 S. Ct. 1711, 114 L. Ed. 2d 152, 166 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law."). *Cf. Duke Power Co. v. Carolina Env. Study G.P.,* 438 U.S. 59, 70, 98 S. Ct. 2620, 57 L. Ed. 2d 595, 609 n.14 (1978) ("Appellees' failure to assert § 1331(a) as a basis for jurisdiction in their complaint is not fatal since the facts alleged are sufficient to support such jurisdiction.").

The district court below completely failed to take cognizance of Section 106 in determining the existence of jurisdiction over the tort action. The Tenth Circuit, citing its prior decision in *Daigle v. Shell Oil Co.,* 972 F.2d 1527, 1539 (10th Cir. 1992), asserted its "discretion to eschew untimely raised legal theories which may support that jurisdiction" and refused to entertain the Section 106 issue. The Tenth Circuit's decision in *Daigle* relied on the Fifth Circuit's decision in *Ceres Gulf v. Cooper,* 957 F.2d 1199 (5th Cir. 1992), the facts of which are completely inapposite to this case and totally undermine the reliance of

the Tenth Circuit on such precedent. *Ceres* entailed a jurisdiction issue first raised at oral argument and in a subsequent letter brief instead of, pursuant to appellate court rules, being raised in the party's initial brief. The Fifth Circuit stated that "legal theories may not be raised on appeal in this fashion" nor would the court "allow such legal theories to crop up at any point during the appeal." *Id.* at 1207 n.16. "Considering Ceres Gulf's belatedly asserted maritime jurisdiction theory would run afoul of the well-established procedures for timely presentation of legal issues on appeal, in which all parties have the opportunity to brief and argue issues within the established time frame for doing so." *Id.* In this case, FSC and FSA forcefully raised the Section 106 issue in their opening brief, thus presenting the issue in a timely manner. The Tenth Circuit's refusal to rectify the lower court's oversight of Section 106 is contrary to the obligation of the appellate court to determine jurisdiction and otherwise avoid the improvident dismissal of a case for lack of jurisdiction. *See Detroit Pension Fund*, 91 F.3d at 30 ("it seems to us that a court of appeals should avoid dismissing the case for want of jurisdiction if a basis for federal jurisdiction appears in the record, including the appellate briefs and arguments of the parties.").

The Tenth Circuit also disregarded the plain meaning and effect of 28 U.S.C. § 1653. That statute clearly provides for the amendment of defective allegations of jurisdiction "in the trial or apellate court." Noting that "such amendments will be freely permitted where necessary to avoid dismissal on purely technical grounds," the Second Circuit recently deemed pleadings to be amended based on filings in the appellate court so as to properly allege jurisdiction. *Canedy v. Liberty Mut. Ins. Co.*, 126 F.3d 100, 103 (2d Cir. 1997). *Canedy* relied upon the earlier decision of this Court, which sanctioned an amendment

of the pleadings at this highest level of appeal in order to remedy a jurisdictional defect: "Since the defect may be cured by amendment, and nothing is to be gained by sending the case back for that purpose, we shall consider the amendment made, and dispose of the case." *Realty Holding Co. v. Donaldson,* 268 U.S. 398, 400, 45 S. Ct. 521, 69 L. Ed. 1014, 1015 (1925). *See also Norton v. Larney,* 266 U.S. 511, 45 S. Ct. 145, 69 L. Ed. 413 (1924); *Molnar v. National Broadcasting Co.,* 231 F.2d 684, 686 (9th Cir. 1956) ("A complaint defective in allegation of diversity of citizenship can be amended to show the true state of facts even in the United States Supreme Court.") (citing *Norton v. Larney*). Cognizant of the effect of 28 U.S.C. § 1653, the courts of appeal have repeatedly allowed amendments to the pleadings in order to remedy any defects in jurisdiction. The Seventh Circuit has observed:

> Furthermore, the Federal Rules of Civil Procedure's liberal amendment rule permits a party who has not proved or even alleged that diversity exists to amend his pleadings even as late as on appeal, and if nothing appears to the appellate court that would bar jurisdiction, jurisdiction is deemed proper, despite the plaintiff's usual burden of alleging and proving jurisdiction. [Citation omitted.] Such defective allegations of jurisdiction may be amended even after judgment has been entered and an appeal taken.

Mutual Service Cas. Ins. Co. v. Country Life Ins. 859 F.2d 548, 550 (7th Cir. 1988). *See also Hahn v. United States,* 757 F.2d 581, 587 (3d Cir. 1985) ("We may, on appeal, consider whether jurisdiction was proper on grounds —such as the Tucker Act—not asserted below."); *Fidelity & Cas. Co. v. Reserve Ins. Co.,* 596 F.2d 914, 918 (9th Cir. 1979) ("dismissing a case for want of jurisdiction is not favored when an alternative basis for jurisdiction exists even if the alternative basis was not asserted in the trial

court," citing Title 28 § 1653); *Eisler v. Stritzler,* 535 F.2d 148, 152 n.3 (1st Cir. 1976) ("Under the curative provisions of 28 U.S.C. § 1653, the missing allegations may be supplied at any time, including on appeal."); *accord, Averbach v. Rival Mfg. Co.,* 809 F.2d 1016 (3d Cir. 1987); *Strain v. Harrelson Rubber Co.,* 742 F.2d 888 (5th Cir. 1984).

CONCLUSION

The Tenth Circuit has expanded the discretionary function exception to a point where it swallows the rule. The result is that aggrieved parties are not entitled to a day in court even to prove that the government conduct was contrary to its mandatory duty.

The pronouncement of this Court in *Gaubert* and *Berkovitz* that an agency is not shielded with immunity under the exception if, in fact, the agency disobeyed its mandate is rendered impotent by the ruling below. While this Court would recognize a cause of action for such conduct, the Tenth Circuit holds that litigants do not have the right to a trial to prove the nature of the conduct of the agency involved and how it violates its mandate.

The importance of the case extends well beyond the damage suffered by FSC and FSA. Under the rule of law, the courts are the final patron of policy. Granting the Petition is necessary to establish *enforceable* limits on agency conduct. Without limits on such conduct, enforceable through the process of law, public policy is without a guardian.

Furthermore, when an agency steps away from its governmental duties and begins operating as would a private citizen in private business, the law should not shield such private conduct with governmental immunity. Private operation of non-governmental business must proceed according to established rules of law that guide how private parties deal with one another. To allow a government

player to be immune from those rules while engaging in private enterprise paves the way for unlimited abuse of private parties in their dealings with the government.

Finally, a decision which dismantles the inviolable principle of non-waiver of jurisdiction cannot stand. The use of the concept of a "jurisdictional waiver" is contrary to every reported case from the other appellate courts where jurisdiction was timely raised initially on appeal, and, in addition, violates 28 U.S.C. § 1653, which specifically permits \defective jurisdictional allegations to be amended in the appellate courts. Not only does such a ruling contradict the overwhelming mass of case law throughout the federal system, including this Court, it also erodes an inherent predicate of our judicial system, to-wit: the courts must always examine the issue of the existence of jurisdiction as part of their exercise of judicial power. Parties cannot by their consent create jurisdiction where none exists. Neither do parties waive jurisdiction when it does exist simply by virtue of a failure to properly recite that jurisdiction. This Court should not sanction an appellate court ruling which does violence to such an essential concept of our jurisprudence.

Respectfully submitted,

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August 2, 1999

APPENDICES

APPENDIX A

[Filed May 4, 1999]

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 97-3220

FRANKLIN SAVINGS CORPORATION;
FRANKLIN SAVINGS ASSOCIATION,
Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA;
FEDERAL DEPOSIT INSURANCE CORPORATION,
as successor-in-interest to the Resolution Trust Corporation,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 95-CV-2100-GTV)

Before BALDOCK, KELLY, and MURPHY, Circuit Judges.

MURPHY, Circuit Judge.

This appeal concerns the breadth of the discretionary-function exception to the waiver of sovereign immunity under the Federal Tort Claims Act (FTCA). Plaintiffs, who owned most of the stock of the Franklin Savings Association (FSA or the Association), sued the United

States and the Resolution Trust Corporation[1] (RTC), seeking damages allegedly caused by the RTC's conduct as FSA's conservator. Before any discovery, the district court dismissed the suit under Federal Rule of Civil Procedure 12(b)(6) on the basis that plaintiffs' claims fell within the FTCA's discretionary-function exception. This court has jurisdiction of plaintiffs' appeal under 28 U.S.C. § 1291.

Plaintiffs primarily argue that their claims arise not from the RTC's performance of a discretionary function, but from its violation of specific, mandatory duties while managing FSA. Those duties include a specific dictate in the order creating the conservatorship that the RTC conserve and not liquidate the Association. Plaintiffs argue that the RTC nonetheless intentionally effected a *de facto* liquidation of FSA under the guise of conserving it. They thus allege that the RTC acted in subjective bad faith while performing acts which, viewed objectively, fall within the scope of a discretionary function. This poses the question whether such allegations should bar dismissal under the discretionary-function exception. Because this court concludes that the exception's purpose compels dismissal of any claim whose ultimate resolution would require judicial scrutiny of an official's good faith or subjective decisionmaking, we AFFIRM.

II. PROCEDURAL AND FACTUAL BACKGROUND

This is the third appeal to this court and the seventh published opinion involving disputes over the conservation and liquidation of the long-gone but not forgotten Franklin Savings Association. *See Franklin Sav. Ass'n v. Office of Thrift Supervision*, 740 F. Supp. 1535 (denying sum-

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[1] The Federal Deposit Insurance Corporation (FDIC) is now a defendant as the RTC's successor-in-interest. *See* 12 U.S.C. § 1441a(m)(1).

mary judgment), 742 F. Supp. 1089 (D. Kan. 1990) (granting judgment after trial), *rev'd*, 934 F.2d 1127 (10th Cir. 1991) [*Franklin I*]; *Franklin Sav. Ass'n v. Office of Thrift Supervision*, 821 F. Supp. 1414 (D. Kan. 1993), *aff'd*, 35 F.3d 1466 (10th Cir. 1994) [*Franklin II*]; *Franklin Savings Corp. v. United States*, 970 F. Supp. 855 (D. Kan. 1997) (decision now on appeal) [*Franklin III*]. This court has distilled the following summary of the litigation from *Franklin II*. *See* 35 F.3d at 1468.

In 1990 the Director of the Office of Thrift Supervision (OTS) determined that FSA was "in an unsafe and unsound condition to transact business" and appointed the RTC as its conservator.[2] FSA and its parent, Franklin Savings Corporation (FSC), filed suit under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA) to remove the conservator. *See* 12 U.S.C. § 1464(d)(2)(E) (1989) (authorizing appointment and judicial review); *see generally* 12 U.S.C. §§ 1461-1470 (1989). While the district court held the appointment arbitrary and capricious, this court reversed, holding that review of the decision to appoint a conservator is limited to the administrative record and that said record supported the decision. *See Franklin I*, 742 F. Supp. at 1126, *rev'd*, 934 F.2d at 1149. In 1992, after the first suit had been dismissed, the OTS changed the RTC's role from conservator to receiver. *See* 57 Fed. Reg. 41,969 (1992). FSA and FSC again sued. In 1994 this court affirmed the dismissal of that suit on the ground the decision to appoint a receiver is not subject to judicial review. *See Franklin II*, 821 F. Supp. at 1418-24, *aff'd*, 35 F.3d at 1469-71.

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[2] For a "generalized and simplified overview of the facts" leading to the conservatorship, see *Franklin I*, 934 F.2d at 1133-35. For a more detailed account, see *Franklin I*, 742 F. Supp. at 1099-1124.

The present action, meanwhile, arose from plaintiffs' 1993 filing of an adversary complaint against the RTC in bankruptcy court, in a proceeding concerning the estate of FSC. *See Franklin III*, 970 F. Supp. at 860. The complaint sought damages under the FTCA based on the RTC's acts as conservator. *See id.* The district court withdrew the reference from the bankruptcy court, and plaintiffs amended their complaint to name the FDIC, the RTC's successor-in-interest.[3] *See id.* The government moved to dismiss all claims for lack of subject-matter jurisdiction. The court granted the motion, and this appeal followed.[4]

On appeal, plaintiffs primarily challenge the dismissal of their FTCA claim. They premise that claim on the RTC's conduct in 1990-92, while it was acting under an order appointing it "as conservator . . . not for the purpose of liquidation." Plaintiffs argue that the RTC disregarded that specific mandate, ignored various narrower mandates in its own manuals governing conservatorships, and breached its fiduciary duties as a conservator by intentionally effecting a *de facto* liquidation of the Association.

Plaintiffs specifically decry four sets of transactions from which they infer the RTC's *sub rosa* intent to liquidate the Association. Three of these involve allegedly precipitate, all-or-nothing sales of asset portfolios in saturated markets. The fourth involves an ommission: before issuing reports on FSA's capital, the RTC did not

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[3] Plaintiffs also added a claim under the Administrative Procedure Act (APA), which the court also dismissed. *See Franklin III*, 970 F. Supp. at 860, 863-64. On appeal, plaintiffs advance no reason to reinstate that claim other than the bankruptcy-code argument discussed *infra* at 7-9.

[4] Plaintiffs' motion to supplement the record on appeal is granted.

exercise its statutory power to repudiate burdensome, high-interest bonds issued by FSA. The capital reports, which reflected asset write-downs that had decreased FSA's equity, caused the bond trustee to defease the bonds, triggering large losses for FSA. Plaintiffs argue that the RTC engaged in such conduct in order to deplete FSA's capital and thereby retrospectively justify the OTS's appointment of a conservator. They allege that the RTC caused FSA to lose some $500 million in potential profits, thus ensuring the Association's future liquidation rather than its conservation and eventual return to plaintiffs' control.

III. DISCUSSION

Plaintiffs' complaint included two damage claims pertinent to this appeal: one against the United States under the FTCA, and one against the FDIC at common law.[5]

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[5] Plaintiffs sued in the names of both FSC and FSA. The Government disputed their right to sue in either capacity. It argued that FSA had not filed an administrative claim, as the FTCA requires. *See Franklin III*, 970 F. Supp. at 861 (citing 28 U.S.C. § 2675(a)). FSC had filed a claim, but the Government argued that it could not bring either a shareholder-derivative suit, as it had not first demanded that FSA's directors file suit, or a direct claim, as its injuries were derivative. *See id.* The district court agreed that FSA could not sue, and that FSC could not sue directly. It held, however, that FSC could bring a derivative claim, because it would have been futile to demand of the FDIC, which now directs the Association, that it essentially sue itself. *See id.* at 861-63.

Both parties appeal those rulings, but this court need not resolve those issues. Our affirmance on the discretionary-function exception disposes of all of plaintiffs' claims, direct or derivative. Whether a suit falls within the exception is a threshold question of subject-matter jurisdiction. *See, e.g., Tippett v. United States*, 108 F.3d 1194, 1196-97 (10th Cir. 1997); *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1537 (10th Cir. 1992). Neither party suggests that the inquiry differs if the suit is direct or derivative. Only if this court were to hold that there is subject-matter jurisdiction under the FTCA, or under another waiver of immunity, would we have to decide whether Kansas law entitles plaintiffs to sue directly,

On appeal, the plaintiffs assert three ways the government has waived sovereign immunity: (1) under the Bankruptcy Code, 11 U.S.C. § 106; (2) under the FTCA, because the discretionary-function exception does not apply; and (3) under the RTC's and FDIC's sue-and-be-sued clauses.[6]

A. Plaintiffs Have Waived Reliance on Bankruptcy Code § 106

Plaintiffs' first argument is easily dispatched, for their complaint did not allege Bankruptcy Code § 106 as a basis for subject-matter jurisdiction, and they never sought leave to amend their complaint to do so, or in any way asked the district court to assume jurisdiction under that provision. Plaintiffs address this problem by invoking the long-established rule that defects in subject-matter jurisdiction can never be waived and may be raised at any time on appeal. *See Mansfield, Coldwater & Lake Mich. Ry. v. Swan*, 111 U.S. 379, 382 (1884); Fed. R. Civ. P. 12(h)(3); *and, e.g., Laughlin v. K Mart Corp.*, 50 F.3d 871, 873 (10th Cir. 1995). This court, however, has held that "our responsibility to ensure even *sua sponte*

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derivatively, or neither. This is true even if we also deem the latter questions "jurisdictional." *See Arizonians for Official English v. Arizona*, 520 U.S. 43, 66-67 (1997) (holding that court may assume standing, despite grave doubts, in order to decide mootness, as both questions concern Article III jurisdiction, not the merits); *Cross-Sound Ferry Servs., Inc., v. ICC*, 934 F.2d 327, 341 (D.C. Cir. 1991) ("[C]ourts properly rest on one jurisdictional ground instead of another."), *overruled in other part by Steel Co. v. Citizens for a Better Envir.*, 523 U.S. 83, ——, 118 S.Ct. 1003, 1012 (1998).

[6] Plaintiffs also briefly argue that dismissal before discovery was premature. They develop this argument so superficially, however, as to waive it. *See, e.g., Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 880 & n.9 (10th Cir. 1997) (holding that party who noted issue and made "several broad, conclusory statements" on appeal waived argument for failure to develop).

that we have subject matter jurisdiction before considering a case differs from our discretion to eschew untimely raised legal theories which may support that jurisdiction." *Daigle v. Shell Oil Co.*, 972 F.2d 1527, 1539 (10th Cir. 1992); *see also United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1518 n.2 (10th Cir. 1996) (declining to consider *sua sponte* a basis for jurisdiction not argued below or on appeal).

Plaintiffs attempt to distinguish *Daigle*. They acknowledge that this court refused to consider a waived argument supporting jurisdiction of Daigle's suit. They argue, however, that we did so because the argument involved disputed factual issues on which the district court had made no findings. Plaintiffs assert that their bankruptcy argument, by contrast, presents "a pristine legal question."

Plaintiffs misread *Daigle*. This court held that we have no duty to consider waived arguments supporting subject-matter jurisdiction. *See* 972 F.2d at 1539. We then noted our discretion to ignore a waiver, in any case, if "presented with a strictly legal question the proper resolution of which is beyond doubt." *Id.*[7] In declining to apply that exception, this court saw no need to "delve into an in depth analysis" of the jurisdictional issue, instead simply noting that Daigle's new arguments "[did] not go unchallenged." *Id.* at 1540.[8] The same is true here: plaintiffs argue plausibly that the government waives its discretionary-function immunity by filing a claim in bank-

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[7] Courts may also ignore a waiver "when manifest injustice would otherwise result." *Daigle*, 972 F.2d at 1539. Plaintiffs do not suggest that we must over-look their waiver of the § 106 argument in order to avoid "manifest injustice."

[8] This court did note the lack of a fully developed record, but we relied equally on Daigle's failure to "undoubtedly demonstrate[] an unequivocal waiver of sovereign immunity." *Id.* at 1540.

ruptcy against the victim's estate. The government argues plausibly to the contrary. Plaintiffs may have shown that the legal question they raise is "pristine," but they have shown, as they must, that its "proper resolution . . . is beyond doubt." *Id.* at 1539. This court thus declines to overlook their waiver.

B. The Discretionary-Function Exception to the FTCA's Waiver of Sovereign Immunity

1. *Standard of Review*

The government moved to dismiss the FTCA claims under Rules 12(b)(1) and (6), and the court treated the motion as one to dismiss for failure to state a claim under Rule 12(b)(6). *See Franklin III*, 970 F. Supp. at 860-61.[9] As the court recognized, it must convert a Rule 12(b)(1) motion to one under Rule 12(b)(6), or for summary judgment, " '[i]f the jurisdictional question is intertwined with the merits of the case.' " *Bell v. United States*, 127 F.3d 1226, 1228 (10th Cir. 1997) (quoting *Wheeler v. Hurdman*, 825 F.2d 257, 259 (10th Cir. 1987)). Whether the discretionary-function exception applies is such a question. *See id.*; *Tippett v. United States*, 108 F.3d 1194, 1196 (10th Cir. 1997). This court reviews *de novo* a Rule 12(b)(6) dismissal. *See Tippett*, 108 F.3d at 1196-97.

2. *Summary of Applicable Law*

To avoid dismissal of an FTCA claim under the discretionary-function exception, a plaintiff must allege facts

[9] The district court thus did not consider two affidavits which the government filed. *See Franklin III*, 970 F. Supp. at 861 n.4. It did, however, consider the RTC manuals and directives which plaintiffs appended to and incorporated by reference in their complaint. *See id.* at 865-66.

that place its claim facially outside the exception. *See Kiehn v. United States*, 984 F.2d 1100, 1105 n.7 (10th Cir. 1993). The district court held that plaintiffs' claims fell within the exception, which this court recently explained as follows:

> Under the FTCA, the United States waives is sovereign immunity with respect to certain injuries caused by government employees acting within the scope of their employment. 28 U.S.C. § 1346(b). The FTCA contains an exception to this broad waiver of immunity, however, for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." Id. § 2680(a). . . . "The discretionary function exception . . . marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808 (1984). If the discretionary function exception applies to the challenged governmental conduct, the United States retains its sovereign immunity, and the district court lacks subject matter jurisdiction to hear the suit. *See Johnson v. United States Dep't of Interior*, 949 F.2d 332, 335 (10th Cir. 1991).

Tippett, 108 F.3d at 1196-97 (second omission in original).

In dozens of cases in the last decade, this court has determined whether government conduct was within the exception by using a two-branch analysis announced in

Berkovitz ex rel. Berkovitz v. United States, 486 U.S. 531, 536-37 (1988). This court has summarized the analysis as follows:

> First, we determine whether the governmental conduct at issue "is a matter of choice for the acting employee." [*Berkovitz*, 486 U.S.] at 536. "[C]onduct cannot be discretionary unless it involves an element of judgment or choice. Thus, the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *Id.* (citation omitted). In such a situation, "the employee has no rightful option but to adhere to the directive." *Id.*
>
> If the conduct at issue involves an element of judgment or choice, *Berkovitz* requires us to "determine whether that judgment is of the kind that the discretionary function exception was designed to shield." *Id.* Congress preserved governmental immunity for discretionary functions to "prevent judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 536-37. Therefore, the exception "protects only governmental actions and decisions based on considerations of public policy." *Id.* at 537.

Bell, 127 F.3d at 1228-29. This court has also noted the Supreme Court's modification or *Berkovitz*'s second branch: "Only decisions that are 'susceptible to policy analysis' are protected by the . . . exception." *Daigle*, 972 F.2d at 1538 (quoting *Gaubert v. United States*, 499 U.S. 315, 325 (1991)); *see infra* at 22-23 (discussing distinction between decisions "based on" and "susceptible to" policy analysis).

3. *Plaintiffs' FTCA Claims*

Plaintiffs' general grievance is that the RTC violated the provision in the OTS order that the appointment was "not for the purpose of liquidation." Notwithstanding that dictate, plaintiffs claim, the RTC proceeded to liquidate FSA. To add specific content to this most general claim, plaintiffs contend that the RTC breached twenty specific, mandatory requirements detailed in several agency manuals and directives which guided RTC employees in managing institutions the RTC was appointed to conserve.

a. Plaintiffs' claims are not based upon the breach of any specific, mandatory requirements contained in RTC manuals and directives.

The gravaman of plaintiffs' complaint is that the RTC engaged in unwise asset sales without considering all relevant factors. Plaintiffs contend the RTC thereby impaired FSA's franchise value and failed to maintain the value, or maximize the sale price, of its assets. Plaintiffs ultimately contend that these failures show that the RTC's intent was never to conserve FSA, but was from the start to liquidate it. In other words, the RTC's decisions whether, when, and how to sell or manage various assets are consistent with an intent to liquidate, and inconsistent with an intent to conserve.

Day-to-day decisions in operating a financial institution involve discretion. Unless a regulation specifically mandates a particular action, such decisions satisfy the first branch of *Berkovitz*. *See Gaubert*, 499 U.S. at 325-31 (1991) (applying *Berkovitz* to management of savings-and-loan). "Day-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible

courses is the wisest." *Id.* at 325. The Court found it "plain" that the actions at issue in *Gaubert* "involved the exercise of choice and judgment." *Id.* at 331.[10]

To distinguish *Gaubert*, plaintiffs must identify regulations governing the RTC's day-to-day management of a savings association that are sufficiently specific and mandatory to eliminate the discretion that such management "plain[ly]" entails. After listing their twenty "specific and mandatory" provisions, plaintiffs challenge the particular sets of transactions discussed *supra* at 5. They focus on five requirements that the RTC allegedly violated in those transactions.

i. *Most of the requirements on which plaintiffs focus are not specific and mandatory.*

Four of the five requirements are to maintain asset values, avoid sales that reduce franchise value, maximize value, and schedule sales based on various concerns:

> The RTC's Asset Management and Disposition Manual has an asset-marketing section, whose "purpose is to establish policy guidelines for the packaging and sale of loans and other assets." It declares a policy of "tak[ing] the necessary steps to ensure that asset integrity and value are maintained in order to maximize sales opportunities."
>
> The above section also notes that "[a]sset sales should . . . occur quickly after [a financial] institution is

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[10] The Court rejected the argument "that the challenged actions fall outside the discretionary function exception because they involved the mere application of technical skills and business expertise." *Gaubert*, 499 U.S. at 331. That was "just another way of saying that the considerations involv[ed in] the day-to-day management of a business concern such as [a savings association] are so precisely formulated that decisions at the operational level never involve the exercise of discretion within the meaning of § 2680(a), a notion that we . . . reject[]." *Id.*

> placed into conservatorship if the sale does not negatively impact the franchise value of the institution."
>
> The "Background" paragraph of a directive on selling and managing securities says that the "RTC is charged with, among other things, the maximization of value in the timely and efficient disposition of securities."
>
> The same directive also lists responsibilities of the RTC Capital Markets Branch. It directs the Branch to "[m]anage and schedule timing of securities sales based on needs of institutions, market conditions, type of security, and case of sale."

None of the four constitutes a "specific and mandatory requirement" as this court's precedent define that term. Instead, they all state general goals, or sets of objectives to balance, in precatory rather than mandatory language.

In *Tippett* this court held that a Park Service policy that "[t]he saving of human life will take precedence over all other management actions" was "too general to remove the discretion from [a Park Ranger's] conduct" in a situation that threatened human life. *See* 108 F.3d at 1197. In *Daigle* this court addressed a statute defining environmental-remediation actions "necessary to prevent, minimize, or mitigate damage to the public health or welfare." The statute specified that the actions should "attain a degree of cleanup . . . [which,] at a minimum . . . [en]sures protection of human health and the environment." *See Daigle*, 972 F.2d at 1540 (analyzing 42 U.S.C. §§ 9601(23) & 9621(d)(1)). It thus specified minimum attainments without specifying a course of action to attain them. This court held the statute did not contain "specific and mandatory directives." *See id.*

The four pasages above are no more specific or mandatory than those in *Tippett* and *Daigle*. The first, which

refers to RTC "policy," leaves it to employees to decide which "steps" are "necessary." The second mentions asset sales that "negatively impact the franchise value of the institution" as an unelaborated caveat to a provision *encouraging* sales. It does not mandate any specific process or formula for determining which sales will have such an impact. The third describes "maximization of value" as one RTC duty "among other things." It neither elaborates that general command nor specifies how to perform the discretionary task of balancing timeliness, efficiency and return. The final passage lists four broad considerations to balance, in an unspecified calculus, without specifying a course of action for the complex task of managing asset sales.

ii. *Plaintiffs failed to allege a damage claim for breach of a specific, mandatory duty to prepare case memoranda.*

The lone potentially troubling requirement among the five on which plaintiffs have focused is found in the RTC's Asset Management and Disposition Manual. It directs employees preparing case memoranda, which are "formal written document[s] used to request authorization to take . . . action on behalf of the RTC," to compare the proposed action to available alternatives. It specifies that "[a]ll the alternatives must be weighed comprehensively and objectively to determine the course of action in the best interest of the RTC." There is some question whether that passage would qualify as a "specific and mandatory directive." [11] Even if it does, however, plain-

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[11] To allow plaintiffs to avoid the discretionary-function bar by alleging that RTC employees breached a specific duty to report information, even though the harmful decisions based on the information were themselves discretionary, would be in tension with precedent. *See Johnson v. United States*, 949 F.2d 332, 339-40 (10th Cir. 1991) (rejecting attempt to base claim not only on

tiffs' complaint was deficient because, as discussed below, it did not identify the mere failure to physically prepare case memoranda weighing alternatives as the cause of plaintiffs' injuries.

The government denies that this passage is specific and mandatory. It argues that the passage simply "provides for alternatives to be 'weighed . . .' " and thus "implicitly granted RTC discretion to identify the pertinent options and determine the weight to attribute to each." This argument has force insofar as it goes. But the passage does not only concern the discretionary and unquantifiable mental process of weighing alternatives. It also concerns the arguably nondiscretionary and definitely quantifiable physical process of drafting memoranda which weigh al-

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discretionary decision how to conduct rescue, but on allegedly nondiscretionary tasks of gathering and communicating data about accident, as latter tasks are "inextricably tied" to former, leaving "[n]o meaningful way . . . to consider [those tasks] apart from the total rescue decision"). In *Johnson*, however, no specific, mandatory requirement governed the information-gathering or communication. *See* 949 F.2d at 340 n.10. *Johnson* thus does not foreclose an FTCA suit based on negligence that did violate such a requirement.

Other circuits' precedent is divided. *Compare Fisher Bros. Sales v. United States*, 46 F.3d 279, 286-87 (3rd Cir. 1995) (*en banc*) (7-6) (barring such claims absolutely) *with Gray v. Bell*, 712 F.2d 490, 515-16 (D.C. Cir. 1983) (barring claim, but foreseeing exceptions to rule) (cited in *Johnson*, 949 F.2d at 340) *and Payton v. United States*, 679 F.2d 475, 482 & n.6 (5th Cir. Unit B 1982) (*en banc*) (similar, and similarly cited)). *See also In re* The Glacier Bay, 71 F.3d 1447, 1451-54 (9th Cir. 1995) (allowing comparable claim); *General Dynamics Corp. v. United States*, 139 F.3d 1280, 1283-86 (9th Cir. 1998) (trying to harmonize *Fisher Bros.* and *Glacier Bay*); *id.* at 1287-88 (O'Scannlain, J., dissenting). *See generally* Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. Davis L. Rev. 691 (1997). Because plaintiffs' claim is not actually based on a duty to report information, as discussed in text, this court expresses no opinion on the legal viability of such a claim.

ternatives. On review of this Rule 12(b)(6) dismissal, this court must assume that RTC employees did not draft case memoranda seeking authorization for the challenged transactions, or that, if they did, such memoranda failed to identify and weigh alternatives.

While the government has ignored the potential significance of a requirement not just to weigh alternatives but to record the process in writing, plaintiffs have ignored it as well. Their complaint did not attribute any harm to the breach of a specific mandate to draft memoranda, as opposed to a failure to perform the discretionary function of weighing options. In that part of their complaint listing specific, mandatory requirements, plaintiffs simply allege that the RTC "failed to prepare Case Memoranda in the manner specifically mandated" and "failed to comprehensively and objectively weigh the alternative actions available to it as specifically mandated." Their complaint then details three of the four "liquidation transactions" on which plaintiffs focus on appeal. In describing each transaction, the complaint perfunctorily and identically recites that the RTC acted "without comprehensivey and objectively weighing the alternative actions available to it." Nowhere else in their 28-page complaint or in their response to the government's motion to dismiss did plaintiffs allude in any way to the specific duty to draft case memoranda.

After the bald asertion that the RTC failed to prepare memoranda weighing alternatives, the only parts of the complaint which in any way linked that requirement to any particular events or injuries simply alleged that the RTC did not "comprehensively and objectively weigh the alternative actions available." The complaint does not suggest that plaintiffs' multi-million-dollar injuries flow from a failure to perform the arguably nondiscretionary

function of drafting memoranda listing alternatives, and not from neglect of the discretionary function of "comprehensively and objectively weigh[ing] the alternative actions available." Most importantly, plaintiffs have not argued on appeal that the district court should have read their complaint to allege that a failure to memorialize, as opposed to a failure to weigh options, caused their injuries.

iii. *Conclusion.*

Accordingly, as discussed above and in the district court's opinion,[12] none of the twenty provisions that the RTC allegedly violated can enable plaintiffs to show that their asserted injuries are based upon nondiscretionary conduct. Those provisions thus afford no basis for reinstating plaintiffs' dismissed complaint.

b. Plaintiffs cannot avoid the discretionary-function bar by alleging the RTC intentionally ignored its specific mandate to conserve and not liquidate FSA.

Plaintiffs' main argument is that "[t]he RTC as conservator was required to . . . operate and preserve FSA. Instead, it liquidated FSA and failed to carry out this nondiscretionary obligation." Plaintiffs note that the OTS order appointed the RTC "as conservator for the Association, not for the purpose of liquidation." They detail statutory provisions governing the RTC and reflecting a congressional intent "that only receivers, and not conservators, have the power to liquidate." *Compare* 12 U.S.C.

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[12] This court agrees with the district court, for substantially the reasons stated in its opinion, that plaintiffs have not shown that any of the remaining fifteen requirements is both (a) specific and mandatory and (b) a basis for their claims. *See Franklin III*, 970 F. Supp. at 865-66. Plaintiffs' brief on appeal merely repeats *verbatim* the complaint's list of those requirements.

§ 1821(d)(2)(D) (conservator's powers) *with* §§ 1821 (c)(13)(B) & (d)(2)(E) (receiver's powers). Plaintiffs argue that, because their complaint was dismissed under Rule 12(b)(6), this court must assume the truth of their factual allegations, i.e., that the RTC intentionally chose to liquidate rather than conserve the Association, in violation of the OTS order. If so, then the RTC consciously violated the specific duty mandated by that order, stripping itself of the sovereign immunity preserved by the FTCA's discretionary-function exception.

The specific transactions that plaintiffs challenge as revealing the RTC's intentional violation of the order to conserve and not liquidate are mainly asset sales.[13] The RTC's broad authority specifically included power to sell assets of institutions it was appointed to conserve. *See* 12 U.S.C. § 1821(d)(2)(G)(i)(II) (authorizing FDIC/RTC as conservator to "transfer any asset or liability" of institution). Plaintiffs do not dispute the discretionary character of asset sales, beyond unsuccessfully invoking the RTC manuals. Two related questions, however, must be resolved: (1) can plaintiffs avoid the discretionary-function bar by alleging that RTC employees performed facially authorized acts with an intent to liquidate; (2) are plaintiffs entitled to discovery to show that the sales

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[13] One challenged transaction was not an asset sale. Plaintiffs argue the RTC failed to timely exercise its statutory authority to repudiate burdensome high-interest bonds before it issued reports on FSA's capital which allegedly triggered the bonds' defeasance. *See* 12 U.S.C. § 1821(e)(1) (giving FDIC/RTC discretion, as conservator, to disaffirm or repudiate any burdensome contract if repudiation will promote orderly administration of institution's affairs). The RTC thus had statutory authority to perform the omitted act and discretion in exercising that authority. *See id.* Plaintiffs do not argue that the failure to repudiate breached any duty other than the general duty to conserve and not liquidate. That failure thus raises no issues distinct from those raised by the asset sales.

were meant not to conserve the Association, but to effect an intentional, *de facto* liquidation?

i. *The purpose of the discretionary-function exception.*

At the Rule 12(b) stage, this court cannot simply disbelieve plaintiffs' factual allegations about RTC officials' intent, as the Government urges. Nonetheless, the purpose of the dicretionary-function exceptions compels this court to reject plaintiffs' argument. The argument premises jurisdiction on an allegation that RTC employees *intentionally* undertook the forbidden function of liquidation rather than the mandated, discretionary function of conservation. The Supreme Court has repeatedly insisted, as discussed below, that FTCA claims are not vehicles to second-guess policymaking. That principle requires a federal court to dismiss an FTCA claim if jurisdiction is so dependent on allegations about government officials' intent or decisionmaking process that resolving the claim would require judicial inquiry into those subjective matters.

The Supreme Court has consistently relied on the purpose of the discretionary-function exception in defining its scope. *See Gaubert*, 499 U.S. at 322-26; *Berkovitz*, 486 U.S. at 536-39; *Varig*, 467 U.S. at 807-10, 813-14; *Dalehite v. United States*, 346 U.S. 15, 32-34 (1953). The Court has stressed that the main congressional purpose in creating the exception was to prevent litigants and courts from using FTCA actions as vehicles for "second guessing" executive-branch decisions based on public policy. *See Gaubert*, 499 U.S. at 323; *Berkovitz*, 486 U.S. at 536-37; *Varig*, 467 U.S. at 814; *see also* H.R. Rep. No. 77-2245, at 10 (1942) (discussing exception). This court has repeated that statement of the exception's ani-

mating purpose in a dozen published opinions since *Varig*.[14]

Under the test first established in *Berkovitz*, the government must show that the challenged conduct involves discretion, and that the discretion is of the type Congress intended to protect. Under *Berkovitz*, that meant an exercise of discretion "based on considerations of public policy." 486 U.S. at 537. In *Gaubert*, the Court elaborated on *Berkovitz*, establishing a "strong presumption" that an employee who exercised discretion did so in accord with the policy considerations which led Congress or an agency to confer that discretion. *See* 499 U.S. at 324. The Court stressed that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred . . ., but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325; *see also Kiehn*, 984 F.2d at 1105 (discussing *Gaubert* and holding that "lack of record evidence of public policy factors in the . . . decision . . . is immaterial" because "it is unnecessary for government employees to make an actual 'conscious decision' regarding policy factors" (quoting *Johnson*, 949 F.2d at 339)); *Daigle*, 972

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[14] *See Aragon v. United States*, 146 F.3d 819, 823 (10th Cir. 1998); *Bell v. United States*, 127 F.3d 1226, 1229 (10th Cir. 1997); *Richman v. Straley*, 48 F.3d 1139, 1147 (10th Cir. 1995); *Black Hills Aviation, Inc. v. United States*, 34 F.3d 968, 973 (10th Cir. 1994); *Kiehn v. United States*, 984 F.2d 1100, 1103 (10th Cir. 1993); *Tinkler v. United States*, 982 F.2d 1456, 1464 (10th Cir. 1992); *Ayala v. United States*, 980 F.2d 1342, 1347 (10th Cir. 1992); *Daigle*, 972 F.2d at 1538; *Daniels v. United States*, 967 F.2d 1463, 1464 (10th Cir. 1992); *Johnson*, 949 F.2d at 338; *Redmon ex rel. Redmon v. United States*, 934 F.2d 1151, 1156 (10th Cir. 1991); *Zumwalt v. United States*, 928 F.2d 951, 956 (10th Cir. 1991); *Allen v. United States*, 816 F.2d 1417, 1424 (10th Cir. 1987). The foregoing opinions all quote or cite *Berkovitz*, 486 U.S. at 536-37, *Varig*, 467 U.S. at 814 or 820, or both, or refer without attribution to "second guessing."

F.2d at 1542 (applying presumption that exercise of discretion was based in policy despite allegation that officials " 'rushed into [action] without proper planning' ").

The Court's modification of the second branch in *Berkovitz* to ask whether an exercise of discretion was "susceptible to policy analysis" has lightened the Government's burden. The change has also served to emphasize that courts should not inquire into the actual state of mind or decisionmaking process of federal officials charged with performing discretionary functions. *See, e.g.*, Bruce A. Peterson & Mark E. Van Der Weide, *Susceptible to Faulty Analysis:* United States v. Gaubert *and the Resurrection of Federal Sovereign Immunity*, 72 Notre Dame L. Rev. 447, 464-69, 473 (1997) (counting pre- and post-*Gaubert* case outcomes to show that eliminating inquiry into actual decisionmaking has made it much easier to get FTCA claims dismissed); Richard H. Seamon, *Causation and the Discretionary Function Exception to the Federal Tort Claims Act*, 30 U.C. Davis L. Rev. 708-10 (1997) (explaining how *Gaubert* has "made it even easier for the government to satisfy the second part of the [*Berkovitz*] test").

The *en banc* Third Circuit recently read *Gaubert* broadly to restrict all inquiry into officials' subjective decionmaking. *See Fisher Bros. Sales v. United States*, 46 F.3d 279, 285-87 (3rd Cir. 1995) (*en banc*) (7-6). *Fisher Brothers* concerned a different type of challenge to a discretionary decision than this case, but the court's reasoning in determining the type of inquiry that *Gaubert* bars is applicable.

The case involved the FDA Commissioner's indisputably discretionary decision to bar Chilean grapes from the United States. *See id.* at 282. The decision followed FDA scientists' allegedly negligent testing of grape

samples, which falsely indicated cyanide. *See id.* at 282-83. The *en banc* court concluded that *Gaubert*'s rationale requires dismissal of FTCA claims if a protected exercise of discretion immediately caused the damages. *See id.* at 282, 286-87. The opinion requires dismissal even if plaintiffs disavow any challenge to the exercise of discretion itself. It thus bars suit for negligent performance of nondiscretionary data-gathering functions that preceded a discretionary decision, so long as the decision itself immediately caused the harm. *See id.* at 286-87. *See generally* Seamon, *supra,* at 722-52 (analyzing case).

Despite accepting plaintiffs' version of the facts and conceding that their claims were in a literal sense "based upon" the negligent testing rather than the Commissioner's decision, the court nonetheless rejected their theory of proximate cause as "inconsistent with the purpose of the discretionary function exception." *Id.* at 286. The court relied on *Gaubert* to define the range of inquiry which that purpose forecloses:

> [W]here the injury . . . is caused by a regulatory policy decision, . . . there is no difference in the quality or quantity of the interference occasioned by judicial second guessing, whether the plaintiff purports to be attacking the data base on which the policy is founded or . . . challeng[es] the policy itself.
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> If plaintiffs [could] . . . challeng[e] the manner in which the underlying data was collected, federal courts, of necessity, would be required to examine in detail the decisionmaking process of the policymaker to determine what role the challenged data played in the policymaking. . . . Without such an examination and all of the discovery that would necessarily precede it, a plaintiff . . . would be unable to prove a

> causal link between the alleged negligence and the alleged injury. Yet this is precisely the kind of inquiry that the Supreme Court sought to foreclose when it ruled out any inquiry into an official's "subjective intent in exercising the discretion conferred by statute or regulation."

Id. (quoting *Gaubert*, 499 U.S. at 325).[15]

The court held that policy compelled it to read *Gaubert* as an affirmative bar to any inquiry into officials' subjective decisionmaking: "[t]he social cost of permitting the inquiries required by the plaintiffs' theory are prohibitive." *Id.* The majority identified three types of social cost: (1) large tort judgments against the government; (2) demands on the time and attention of an agency's "most valuable human resources" when plaintiffs conduct discovery into the bases for officials' decisions, and (3) the cost, as Seamon puts it, "of having an official's exercise of discretion skewed by her desire to avoid the first two kinds of costs." *Id.* at 286-87; Seamon, *supra*, at 737. Those costs result whether a court examines the wisdom of the discretionary decision, or merely determines if negligent data-gathering affected it. *See* Seamon, *supra*, at 738-47; *Fisher Bros.*, 46 F.3d at 286-87.

Unlike a direct challenge to the exercise of a discretionary function, which the FTCA plainly bars, plaintiffs' theory would not require analysis of whether the RTC was negligent or abused its discretion while trying to per-

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[15] As a commentator has noted, there is in fact some difference in the "'quality'" of interference occasioned by judicial second-guessing if plaintiffs attack not the discretionary decision itself, but data-gathering that preceded it. *See* Seamon, *supra*, at 735-36 (quoting *Fisher Bros.*, 46 F.3d at 286). In the latter case, a court need not second-guess the decision's wisdom; it need only examine the decisionmaking process to determine whether the negligently produced data affected it. *See id.*

form the function of conservation. And unlike a *Fisher Brothers*-type claim, it would not require analysis of whether any particular data had affected the exercise of discretion. Plaintiffs' theory would instead require judicial inquiry into whether the RTC had in fact tried to perform the discretionary function of conservation, or had instead intentionally chosen to perform, *sub rosa*, the function of liquidation. While differing from a direct or a *Fisher Brothers*-type challenge, plaintiffs' theory would thus still require a court to permit discovery and make factual findings regarding RTC employees' state of mind and intent in running the Association. This the discretionary-function exception does not allow.

ii. *Analogous doctrines limiting inquiry into officials' decisionmaking.*

Other doctrines applicable to official conduct support a reading of *Gaubert* as an affirmative bar to inquiry into officials' subjective intent and decisonmaking. One such doctrine is qualified immunity. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 813-19 (1982) (discussing official immunity from suits seeking damages for constitutional torts).

In *Harlow*, the Supreme Court revised the standard for motions to dismiss based on the doctrine of qualified immunity. *See id.* at 814-18. The Court noted it had crafted the doctrine as a compromise between the need to redress constitutional harms and the need to minimize disruption of officials' duties. *See id.* at 813-14. In so doing, it had assumed that qualified immunity "would permit '[i]nsubstantial lawsuits [to] be quickly terminated.'" *Id.* at 814 (quoting *Butz v. Economou*, 438 U.S. 478, 507-08 (1978)). This would mitigate the costs to society of frequent, unfounded claims against officials. Those

costs include not only direct expenses of litigation, but "diversion of official energy from pressing public issues, . . . deterrence of able citizens from acceptance of public office . . . [and] danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.' " *Id.* (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.)). The direct, diversionary, and dampening costs are the same as those noted by the *Fisher Brothers* court in FTCA suits. *See* 46 F.3d at 286-87.

Before *Harlow*, qualified immunity depended on both the objective reasonableness and subjective good faith of official conduct. *See Harlow*, 457 U.S. at 815 (discussing *Wood v. Strickland*, 420 U.S. 308, 322 (1975)). Good faith, a factual issue, proved unamenable to summary judgment. *See id.* at 816 & n.27. The *Harlow* court thus concluded that "[t]he subjective element . . . has proved incompatible with our admonition in *Butz* that insubstantial claims should not proceed to trial." *Id.* at 815-16. The Court further explained that "substantial costs," beyond simply prolonging insubstantial claims, "attend the litigation of the subjective good faith of government officials." *Id.* at 816. Such litigation had proved peculiarly and broadly disruptive:

> There are special costs to "subjective" inquiries of this kind. Immunity generally is available only to officials performing discretionary functions.[16] In contrast with the thought processes accompanying "ministerial" tasks, the judgments surrounding discretionary action almost inevitably are influenced by

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16 The Court here used the term in its common-law sense, which distinguishes "discretionary" from "ministerial" acts, and not in its distinct but related FTCA sense.

> the decisionmaker's experiences, values, and emotions. These variables explain in part why questions of subjective intent so rarely can be decided by summary judgment. Yet they also frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government.

Id. at 816-17 (footnotes omitted). To limit such disruption, the Court adopted a purely objective test for qualified immunity, holding that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad-reaching discovery." *Id.* at 817-18.

The Court has since emphasized that qualified immunity entails a right to have suits dismissed at "the earliest possible stage of the litigation," sparing officials not only from liability but also from discovery and trial. *See Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (making denial of qualified immunity immediately appealable, lest right to avoid discovery and trial be lost)).[17] The Court recently held that the right to be free from discovery is sufficiently important to entitle a defendant to immediately appeal the denial of a Rule 12(b)(6) motion without sacrificing the right to immediately appeal a later denial of a summary-judgment motion. *See Behrens v.*

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[17] The Court has limited *Mitchell*, allowing immediate appeal only of denials of immunity turning on questions of law, not sufficiency of evidence. *See Johnson v. Jones*, 515 U.S. 304, 313 (1995), *lim'd in turn by Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996) (holding that genuine factual dispute does not preclude appeal of discrete ruling on pure legal issue).

Pelletier, 516 U.S. 299, 308 (1996) (rejecting one-appeal rule in part because "*Harlow* and *Mitchell* make clear that [qualified immunity] is meant to give government officials a right, not merely to avoid 'standing trial,' but also to avoid the burdens of 'such pretrial matters as discovery . . ., as "[i]nquiries of this kind can be peculiarly disruptive of effective government."'" (quoting *Mitchell*, 472 U.S. at 526 (quoting *Harlow*, 457 U.S. at 817))).[18]

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[18] As illustrated by the opinion establishing that municipalities do not share their employees' qualified immunity from § 1983 liability, the analogy between discretionary-function immunity, which limits governmental liability, and qualified immunity, which limits officials' personal liability, is imperfect. *See Owen v. City of Independence*, 445 U.S. 622, 650-58 (1980). The *Owen* Court declined to rely on qualified-immunity rationales to create a governmental immunity. *See id.* at 653-56. It opined that governmental liability is less likely than personal liability to "paralyz[e] the governing official's decisiveness and distort[] his judgment on matters of public policy." *Id.* at 655-56.

Owen's rejection of a qualified-immunity analogy in the § 1983 context is nonetheless irrelevant in construing the discretionary-function exception for several reasons. The *Owen* majority's tentative empirical speculation that governmental liability may not affect individual officials was *dictum* on which the Court did not rely, perhaps because the four dissenting Justices soundly and forcefully criticized the majority's passing comment to that effect. *Compare id.* at 656 (deeming "questionable" but not rejecting link between governmental liability and official timidity); *with id.* at 668-69 (Powell, J., dissenting). *Owen* ultimately relied not on an empirical rationale but a normative one: fear of governmental liability under § 1983 *should* lead officials to alter their decision-making to avoid infringing constitutional rights. *See id.* at 656. This holding is irrelevant in construing the FTCA, which does not protect constitutional rights that trump more mundane policy concerns. *Cf. id.* at 649-50 (rejecting analogy to municipal discretionary-function immunity as reason to create qualified municipal immunity under § 1983 because, in § 1983 action, court "does not seek to second-guess the 'reasonableness' of the city's decision" but only to determine if it violated federal Constitution or laws). The rule that courts must construe § 1983 broadly to serve its remedial purpose, on which *Owen* relied, has no parallel under the FTCA. *Compare id.* at 650 *with Smith v. United States*, 507 U.S. 197, 203

. A ban on FTCA actions which require inquiry into officials' subjective decisionmaking also finds support by analogy to a "central tenet of administrative law." *See* Seamon, *supra*, at 743-44. The tenet is that courts should not " 'probe the mental processes' " of administrative officials in APA or comparable review. *See United States v. Morgan*, 313 U.S. 409, 422 (1941) (quoting *Morgan v. United States*, 304 U.S. 1, 18 (1938)). In *Morgan*, Justice Frankfurter disapproved a court's decision to allow a party to interrogate a Cabinet Secretary "regarding the process by which he reached the conclusions of [a challenged] order, including the manner and extent of his study of the record and his consultation with subordinates." *Id.* The Court said that "the Secretary should never have been subjected to this examination." *Id.*; *see also, e.g., Franklin Savings Ass'n v. Ryan*, 922 F.2d 209, 211-12 (4th Cir. 1991) (discussing breadth of *Morgan* doctrine and applying it to bar examination of former OTS Director regarding his decision to appoint conservator for FSA). Like *Harlow*'s purely objective test for qualified immunity, the *Morgan* doctrine "allow[s] officials to perform their duties without fear of harass-

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(1993) (disavowing "varying [past] statements as to how [the FTCA] should be construed" and adopting rule that courts " 'should not take it upon ourselves to extend the waiver beyond that which Congress intended . . . [or] narrow the waiver that Congress intended.' ") (quoting *United States v. Kubrick*, 444 U.S. 111, 117-18 (1979)). This court had at times said before *Smith* that "[e]xceptions to the FTCA are to be narrowly construed." *Johnson*, 949 F.2d at 336; *see aslo Miller v. United States*, 710 F.2d 656, 662 (10th Cir. 1983); *First Nat'l Bank in Albuquerque v. United States*, 552 F.2d 370, 376 (10th Cir. 1977); *Smith v. United States*, 546 F.2d 872, 877 (10th Cir. 1976). Such comments are no longer valid. Finally, *Owen* predated *Harlow*'s conclusion, made after further experience with qualified-immunity litigation, that an immunity doctrine must exclude "peculiarly disruptive" subjective inquiry if it is to protect governmental efficiency. *See* 457 U.S. at 817.

ment from lawsuits." Stephen G. Breyer & Richard B. Stewart, *Administrative Law and Regulatory Policy: Problems, Text, and Cases* 868 (3d ed. 1992).

Unlike qualified immunity under *Harlow*, the *Morgan* rule has an exception for cases involving "a strong showing of bad faith or improper behavior." *See Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997 (D.C. Cir. 1990) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971)).[19] At first blush, that exception may suggest that analogizing to *Morgan* in the present case would support reversing the dismissal. A comparison, however, of the purposes of and relief available under the APA and the FTCA demonstrates that it is proper to allow judicial inquiry into subjective decisionmaking in a small number of APA cases, but to preclude it in all FTCA cases.

The APA's purpose is to authorize judicial scrutiny of executive-branch decisionmaking, with two narrow exceptions; it created a "basic presumption of judicial review." *See Abbott Labs. v. Gardner*, 387 U.S. 136, 140 (1967) (construing 5 U.S.C. §§ 701-702). The FTCA's purpose, by contrast, is to remove sovereign immunity as a bar to compensating people hurt by federal employees' garden-variety common-law torts. *See Kosak v. United States*, 465 U.S. 848, 855 (1984); *Dalehite*, 346 U.S. at 28; Seamon, *supra*, at 739 n. 195. Its purpose is not to facilitate judicial second-guessing of executive decisionmaking.

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[19] The *Morgan* rule has a second, very narrow exception for cases in which a lack of contemporary findings or other administrative record makes effective judicial review impossible without examining the decisionmaker. *See Community for Creative Non-Violence v. Lujan*, 908 F.2d 992, 997-98 (D.C. Cir. 1990) (citing *Overton Park*, 401 U.S. at 420); *see also Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990) ("Subsequent cases have made clear that remanding to the agency [to explain its reasoning more fully] in fact is the preferred course").

Such second-guessing is, instead, the point of the APA, which Congress enacted in the same year as the FTCA.[20] Given the statutes' diametrically opposed yet complementary purposes, it is sensible to allow judicial inquiry into bad faith and subjective decisionmaking in a few exceptional cases under the APA, but to ban all FTCA suits that necessitate that peculiarly disruptive inquiry.

Treating bad-faith claims differently under the APA and FTCA also accords with the divergent remedies under the two statutes. The APA presumptively authorizes judicial review of almost all administrative acts. *See Abbott Labs*, 387 U.S. at 140; *see also Block v. Community Nutrition Inst.*, 467 U.S. 340, 349 (1984); *Overton Park*, 401 U.S. at 410. As a concomitant of that broad applicability, Congress has limited the relief available under the APA by waiving sovereign immunity only as to suits "seeking relief other than money damages." 5 U.S.C. § 702. The *raison d'etre* of the FTCA, by contrast, is to waive sovereign immunity to suits seeking relief via money damages.

The possibility of damage awards creates a strong incentive to bring FTCA claims. *See* Ronald A. Cass, *The Discretionary Function Exception to the Federal Tort Claims Act, in* 2 Administratve Conf. of the United States, *Recommendations and Reports* 1503, 1519-27 (1987). This incentive, absent in APA suits, suggests the need for a stricter limit on FTCA litigants' ability to require federal courts to scrutinize officials' subjective decisionmaking. The discretionary-function exception provides that limit. The exception must bar all suits dependent on alle-

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[20] *See* Act of June 11, 1946, ch. 324, 60 Stat. 237 (APA) (codified as amended at 5 U.S.C. §§ 701-706); Legislative Reorganization Act of 1946, Pub. L. No. 79-601, tit. IV, 60 Stat. 812, 842 (1946) (FTCA) (codified as amended at 28 U.S.C. §§ 1346(b), 2671-2680).

gations of subjective bad faith if it is to serve its purposes; to protect the separation of powers and executive-branch efficiency from the disruptive discovery and judicial scrutiny that would result if large potential damage awards produced numerous suits, and those suits could not be summarily dismissed because of the factual nature of intent and good faith. Because the APA averts the threat of numerous suits by excluding damages, the narrow bad-faith exception to the rule against examining subjective decisionmaking poses no such risk.[21]

Both *Harlow* and *Morgan* thus support the view that *Gaubert* should bar any FTCA claim for which jurisdiction necessarily depends on an employee's bad faith or state of mind in performing facially authorized acts. In this case, the RTC's statutory powers as conservator authorized all the acts which plaintiffs challenge as a liquidation. Those acts, if done in good faith, entailed an exercise of discretion. Without probing RTC officials' intent and good faith, there is no way ultimately to determine whether their acts constituted a covert, intentional liquidation or an effort, perhaps negligent, at conservation.

Faced with the related question whether an official's acts, if allegedly done in bad faith, can still be within his or her scope of duty for purposes of official immunity, the Supreme Court acknowledged the argument that " 'official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence . . . to exercise a power dishonestly is necessarily to overstep its bounds.' " *Barr v. Matteo*, 360 U.S. 564, 572 (1959) (quoting *Gregoire*, 177 F.2d at

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[21] Because review of bad faith may be available under the APA, moreover, a refusal to permit such inquiry in FTCA suits will not leave all plaintiffs without remedy. *See* Seamon, *supra*, at 741 & n.204.

581). After a "moment's reflection," the Court rejected that theory in light of the immunity doctrine's purpose:

> "[T]hat cannot be the meaning of the [scope-of-duty] limitation without defeating the whole [official-immunity] doctrine. What is meant by saying that the officer must be acting wihin his power [to enjoy official immunity for his acts] cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him."

Id. (quoting *Gregoire*, 177 F.2d at 581). The same is true of the FTCA's requirement that an official be engaged in performing a discretionary function in order to preserve sovereign immunity. What is meant by saying that the officer must be performing a discretionary function cannot be more than that the discretionary function would have justified the act, if the official had been exercising discretion in good faith for any of the purposes on whose account that discretion was vested in the official. Immunity doctrines can not function well if mere allegations of bad faith will penetrate them and require trial, or at least sufficient discovery to allow summary judgment, rather than dismissal under Rule 12(b)(6). *Cf. Behrens*, 516 U.S. at 508 (noting officials' right to rely on Rule 12(b)(6) to avoid pre-summary judgment discovery, not just trial, in construing qualified-immunity doctrine).

iii. *Conclusion.*

The inquiry necessary to decide whether this case involved "negligent, good-faith conservation" or "intentional, bad-faith liquidation" would entail the type of judicial second-guessing which led the *Gaubert* Court to hold that courts need not consider officials' actual decisionmaking in FTCA cases. *See* 499 U.S. at 325. Such an inquiry would impose the same social costs which the

Court presumably considered in *Gaubert*, which the Third Circuit discussed in extending *Gaubert* to bar claims that require even noncritical examination of discretionary decisionmaking, and which the Supreme Court discussed in adopting a purely objective standard for qualified immunity. *See Fisher Bros.*, 46 F.3d at 286-87; *Harlow*, 457 U.S. at 814-17.

A rule requiring dismissal of FTCA claims which necesarily turn on employees' intent or subjective bad faith has one potentially troubling effect. It amounts to an irrebuttable presumption that an employee ordered or required by law to perform a discretionary function, and whose acts are facially consistent with that function, did try in good faith to perform it. That irrebutable presumption will inevitably compel dismisal in cases, hopefully rare, in which an official intentionally ignored or subverted a duty, but not in a way discernible from his or her objective acts or omissions. To note this unavoidable cost is to invoke Learned Hand's "classic statement of the rationale for official immunity":

> "[A]ny official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for [denying recovery] is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest

> calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put . . . to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

Richard H. Fallon, Jr., et al., *Hart & Wechsler's The Federal Courts and the Federal System*, 1165 (4th ed. 1996) (quoting *Gregoire*, 177 F.2d at 581).

c. The RTC did not engage in nongovernmental activity in commerce barring a conclusion that it exercised the sort of discretion the exception protects.

Plaintiffs' final FTCA argument addresses the second branch of *Berkovitz* by invoking the Supreme Court's recent decision in *United States v. Winstar Corp.*, 518 U.S. 839 (1996). Under *Winstar*, plaintiffs argue, the Government ceases to exercise discretion of the sort protected by the FTCA, and thus forfeits its sovereign immunity, when it enters commerce to perform such activities as managing a savings-and-loan association. *See id.* at 895. *Winstar*, however, concerns the United States' contractual obligations, not its tort liability. It is thus inapplicable. *Winstar* concerned thrifts' attempts to enforce regulatory contracts with the United States. *Id.* at 843-44. The Court

observed that " '[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.' " *Id.* at 895 (quoting *Lynch v. United States*, 292 U.S. 571, 579 (1934)). In a footnote the Court also quoted its ancient observation that "when the United States 'comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.' " *Id.* at 895 n.39 (quoting *Cooke v. United States*, 91 U.S. 389, 398 (1875)) That footnote, however, did not change, direct, or compress the scope of the discretionary-function exception for tort claims. Nor did it impicitly overrule the central premise of *Gaubert*: oversight of financial institutions generally entails discretion of the sort protected by the exception. *See* 499 U.S. at 324-25.

C. The FTCA Bars Plaintiffs' Tort Claims Asserted Directly Against the FDIC.

The FDIC's organic statute empowers the FDIC "to sue and be sued in its corporate capacity." 12 U.S.C. § 1441a(b)(9)(E). The district court rejected plaintiffs' theory that this section entitled them to bring tort claims directly against the FDIC, regardless of the limits in the FTCA. *See Franklin III*, 970 F. Supp. at 868. The court aptly quoted the Supreme Court's recent holding that,

> "In order to place torts of 'suable' agencies . . . upon precisely the same footing as torts of 'nonsuable' agencies, Congress, through the FTCA, limited the scope of sue-and-be-sued waivers such as that contained in [the FDIC's] organic statute" Specifically, Congress stated [in the FTCA]:
>
> The authority of any federal agency to sue and be sued in its own name shall not be construed to au-

> thorize suits against such federal agency on claims which are cognizable under [the FTCA, 28 U.S.C. § 1346(b)], and the remedies provided by [the FTCA] in such cases shall be exclusive.

28 U.S.C. § 2679(a). "Thus, if a suit is 'cognizable' under § 1346(b) of the FTCA, the FTCA remedy is 'exclusive' and the federal agency cannot be sued 'in its own name,' despite the existence of a sue-and-be-sued clause."

Id. (quoting *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (first alteration in *Meyer*) (citation omitted from *Meyer*)). The court further correctly explained that plaintiffs' suit is "cognizable" under § 1346(b): it is a straightforward State-law tort suit. *See id.* (citing *In re Cedar Vale State Bank*, 894 P.2d 816 (Kan. 1995) (recognizing claim against bank receiver)). The court also rejected the argument, which plaintiffs repeat on appeal, that "if the tort claim against the United States fails because of the discretionary function exception, it is not cognizable under § 1346(b) and the RTC is subject to the tort claim under its sue-and-be-sued [clause]." *See id.* As the district court correctly noted, this argument would make the discretionary-function exception a meaningless rule of pleading: "Litigants could avoid the force of the statute merely by suing an agency directly." *Id.* Plaintiffs add no persuasive authority to their theory on appeal. This court affirms the dismissal of their common-law tort claims against the FDIC for substantially the reasons stated in the district court's opinion.

IV. CONCLUSION

This court AFFIRMS the dismissal of all claims for lack of subject-matter jurisdiction.

APPENDIX B

[Filed Jun. 17, 1997]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. 95-2100-GTV

FRANKLIN SAVINGS CORPORATION and
FRANKLIN SAVINGS ASSOCIATION,
Plaintiffs,

vs.

UNITED STATES OF AMERICA and FEDERAL DEPOSIT INSURANCE CORPORATION as sucessor-in-interest to the Resolution Trust Corporation,
Defendants.

MEMORANDUM AND ORDER

Plaintiffs bring this action pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) & 2671-2680, and the Administrative Procedures Act ("APA"), 5 U.S.C. § 701 *et seq.*, seeking to recover $820 million in damages arising out of the government's allegedly negligent management and operation of Franklin Savings Association. The case comes before the court on defendants' motion to dismiss (Doc. 59)[1] plaintiffs' second amended complaint pursuant to Fed. R. Civ. P. 12(b)(1)

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[1] Defendants' motion to dismiss (Doc. 59) plaintiffs' second amended complaint incorporates and supersedes their prior motions to dismiss (Docs. 11 and 28).

and 12(b)(6). For the reasons set forth below, defendants' motion is granted.

I. *Background*

The court need not provide an exhaustive explanation of the events culminating in this lawsuit. Several prior decisions have recounted the saga of Franklin Savings in thorough detail. *See Franklin Sav. Ass'n v. Office of Thrift Supervision,* 742 F. Supp. 1089 (D. Kan. 1990), *rev'd,* 934 F.2d 1127 (10th Cir. 1991) (Franklin I), *cert. denied,* 503 U.S. 937 (1992); *Franklin Sav. Ass'n v. Office of Thrift Supervision,* 35 F.3d 1466 (10th Cir. 1994) (Franklin II); *In re Franklin Sav. Corp.,* Bankr. No. 91-41518-11, 1994 WL 114652 (Bankr. D. Kan. Jan. 18, 1994). This court, therefore, will offer only a brief overview of the case.

Prior to its seizure and liquidation by federal regulators, Franklin Savings Association ("FSA") functioned as a state chartered stock savings and loan association. Approximately 94% of FSA's stock was owned by its holding company, Franklin Savings Corporation ("FSC"), a corporation organized and existing under Kansas law.

In 1990, the director of the Office of Thrift Supervision determined that FSA was in an unsafe and unsound condition to transact business and appointed the Resolution Trust Corporation ("RTC") as conservator of the thrift. FSA and FSC subsequently filed a lawsuit under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), 12 U.S.C. § 1461 *et seq.*, seeking to remove the conservator. Although the district court ruled in favor of FSA and FSC, the Tenth Circuit reversed, holding that the administrative record supported the Office of Thrift Supervision's decision to appoint a conservator. *Franklin I,* 934 F.2d at 1150-51.

In September 1992, the director of the Office of Thrift Supervision converted the RTC's role with respect to FSA from conservator to receiver and ordered the RTC to liquidate the savings association. Once again, both FSA and FSC commenced a lawsuit challenging the agency's actions. The Tenth Circuit, affirming the district court's dismissal of the case, held that the Office of Thrift Supervision's imposition of a receivership is not subject to judicial review. *Franklin II*, 35 F.3d at 1469-71.

The instant action has its genesis in a complaint that FSA and FSC initiated in January 1993 in a bankruptcy court adversary proceeding. The matter arose there because FSC had filed for Chapter 11 relief in bankruptcy court eighteen months earlier.[2] In the original adversary complaint, plaintiffs sought damages under the FTCA for negligence, breach of fiduciary duty, and conversion by the RTC while acting as conservator of FSA. In March 1995, this court approved the recommendation of the bankruptcy court that the bankruptcy reference be withdrawn and plaintiffs' adversary complaint be transferred to the district court.[3]

After the case was transferred to this court, plaintiffs made several amendments to their complaint. Specifically, they (1) named the Federal Deposit Insurance Corporation ("FDIC"), which is the successor-in-interest to the

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[2] FSC remains in control of its estate property as a debtor-in-possession.

[3] FSC also filed a separate adversary counterclaim complaint in bankruptcy court in October 1992 against the Office of Thrift Supervision and the United States. In that action, FSC seeks damages under the Tucker Act, 28 U.S.C. § 1491, for alleged misconduct in imposing a conservatorship and receivership upon FSA, and in disposing of FSA's assets under color of FIRREA. This court subsequently ordered the case transferred to the district court, where the matter is now pending as Civ. No. 95-2039-GTV.

RTC, as a defendant; (2) asserted an APA claim alleging that the RTC, as conservator, had acted in excess of its statutory authority; and (3) added a breach of duty claim against defendants based on the RTC's alleged non-governmental activity in commerce while acting as FSA's conservator.

Defendants have filed a series of motions to dismiss. The court now turns to those motions.

II. *Standards Governing Motions to Dismiss*

A. *Generally*

A party seeking to invoke the jurisdiction of a federal court must demonstrate that the case rests within the court's jurisdiction. *United States v. Bustillos,* 31 F.3d 931, 933 (10th Cir. 1994). The burden of proof on this issue depends upon the procedure used to resolve the matter. *See FDIC v. Oaklawn Apartments,* 959 F.2d 170, 174 (10th Cir. 1992).

Defendants' moton to dismiss for lack of subject matter jurisdiction attacks the facial validity of plaintiffs' complaint. Ordinarily, the court would analyze such a motion under Rule 12(b)(1). "However, a court is required to convert a Rule 12(b)(1) motion to dismiss into a Rule 12(b)(6) motion or a Rule 56 summary judgment motion when resolution of the jurisdictional question is intertwined with the merits of the case." *Holt v. United States,* 46 F.3d 1000, 1003 (10th Cir. 1995). A jurisdictional question is considered intertwined with the merits of the case if the court's subject matter jurisdiction is dependent upon the same statute that provides the substantive claim in the case. *Id.*

In the instant action, defendants contend that explicit provisions contained in the APA and FTCA preclude the

court from entertaining plaintiffs' claims. Because plaintiffs predicate their suit on these two statutes, the jurisdictional question before the court is intertwined with the merits of the case. The court, therefore, will analyze defendants' motion pursuant to Rule 12(b)(6).[4]

B. *Rule 12(b)(6)*

A court may not grant a motion to dismiss for failure to state a claim unless it appears that the plaintiff can prove no set of facts that would entitle it to relief. *Jacobs, Visconi & Jacobs, Co. v. City of Lawrence*, 927 F.2d 1111, 1115 (10th Cir. 1991). In considering such a motion, the court must assume the truth of all well-pleaded facts in the plaintiff's complaint and view them in the light most favorable to the plaintiff. *Zinermon v. Burch*, 494 U.S. 113, 118 (1990). The court also must construe the pleadings liberally and indulge all reasonable inferences in favor of the plaintiff. *Lafov v. HMO Colorado*, 988 F.2d 97, 98 (10th Cir. 1993); *Swanson v. Bixler*, 750 F.2d 810, 813 (10th Cir. 1984); Fed. R. Civ. P. 8(a). The issue in reviewing the sufficiency of a complaint is not whether the plaintiff ultimately will prevail, but whether it is entitled to offer evidence to support its claims. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974).

III. Discussion

Before reaching the merits of plaintiffs' claims, the court must address two procedural matters.

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[4] In support of their motion to dismiss, defendants attach the affidavits of Kevin Carver and Ann Richards, two RTC officials. (Doc. 11, Ex. I & Doc. 22, Ex. A). The court, however, has not considered those affidavits or any other material extraneous to the complaint in ruling on defendants' motion.

A. *Administrative Remedies*

Defendants first contend that FSA may not pursue this lawsuit inasmuch as it has not exhausted its administrative remedies. The court agrees. Although Congress waived the government's sovereign immunity for certain tort-based actions when it enacted the FTCA, Congress imposed certain conditions on that waiver. One such condition is that litigants wishing to bring a tort claim against the United States first must file an administrative claim with the appropriate federal agency. 28 U.S.C. § 2675(a). The administrative claim is a jurisdictional prerequisite that the court has no power to waive. *Nero v. Cherokee Nation*, 892 F.2d 1457, 1463 (10th Cir. 1989). If there are multiple claimants, each must file a proper claim unless another claimant is legally entitled to assert such a claim on its behalf. *Muth v. United States*, 1 F.3d 246, 249 (4th Cir. 1993).

FSA argues that it filed no administrative claim because such a claim would have been futile. The fact that pursuing an administrative remedy would be a futile endeavor, however, is irrelevant. *Nero*, 892 F.2d at 1463; *accord Industrial Constructors Corp. v. United States Bureau of Reclamation*, 15 F.3d 963, 967-68 (10th Cir. 1994). Moreover, FSC proffers no evidence that it is authorized to assert a claim on behalf of FSA. *See* 28 C.F.R. § 14.2 (a) (1996) (agent filing administrative claim on principal's behalf must accompany claim with evidence of its authority). Because FSA did not file an administrative claim and because there is no evidence that FSC is authorized to act on behalf of FSA, FSA's FTCA claim must be dismissed.

B. *Standing*

Defendants next argue that although FSC filed an administrative claim, it has no standing to sue for harm allegedly inflicted upon FSA. In support of this assertion, defendants cite the general principle that shareholders do not have standing to redress injuries to the corporation in which they hold stock. *See K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1154 n.7 (10th Cir. 1985) (citations omitted). This rule, however, has no application in the case at bar. Kansas law, which applies here because FSC was incorporated in Kansas, *see Burkes v. Lasker*, 441 U.S. 471, 477-78 (1979), dictates that FSC may pursue this case in a derivative capacity.

1. *Derivative Action*

As an owner of approximately 94% of FSA's stock, FSC may maintain a derivative action on the theory that FSA has sustained a direct injury and is unable to ameliorate the wrong. The derivative action developed in equity to enable shareholders to sue in the corporation's name if individuals or entities controlling the corporation refuse or are unable to sue on its behalf. *Kaufman v. Kansas Gas & Elec. Co.*, 634 F. Supp. 1573, 1577 (D. Kan. 1986). The right to pursue such actions has been codified explicitly in both Fed. R. Civ. P. 23.1 and K.S.A. § 60-223a, the terms of which are virtually identical.

The only potential impediment to FSC's suit is the derivative action's demand requirement. This requirement mandates that shareholders attempt to obtain relief directly from the corporation before initiating a derivative lawsuit.[5]

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[5] Fed. R. Civ. P. 23.1 states that "[t]he complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action the plaintiff desires from the directors or comparable authority and, if necessary, from the shareholders or mem-

The rule essentially serves as a form of "alternative dispute resolution," giving the corporation the opportunity to pursue alternative remedies, thereby resolving grievances without burdensome and expensive litigation. *Kaufman*, 634 F. Supp. at 1577 (citing *Lewis v. Graves*, 701 F.2d 245, 247-48 (7th Cir. 1983)). FSC concedes in its verified complaint that it made no demand upon FSA to assert this tort action. (Second Am. Compl. ¶ 5). FSC insists, however, that it is exempt from the requirement because any such request would have been futile. *Id.*

Despite the strong policy and practical advantages favoring exhaustion of intracorporate remedies, Rule 23.1's demand prerequisite is not without exceptions. As the court in *Kaufman* noted:

> A shareholder may be allowed to assume control of litigation without first affording the directors the opportunity to occupy their normal status by making demand, if the shareholder can show his case is exceptional or, in other words, that demand would be a futile, useless exercise. Thus, the shareholder must demonstrate a degree of antagonism between the directors and the corporate interest such that the directors would be incapable of doing their duty.

Kaufman, 634 F. Supp. at 1578 (citation omitted); *accord Newton v. Hornblower, Inc.*, 582 P.2d 1136, 1141 (Kan. 1978). Once the Office of Thrift Supervision placed FSA into receivership, FSA no longer had an independent existence. The RTC, as receiver, could not be expected to file an FTCA action because such an action would be tantamount to a tortfeasor bringing suit against itself. *See Gaubert v. United States*, 885 F.2d 1284, 1290 n.6 (5th

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bers, and the reasons for the plaintiff's failure to obtain the action or for not making the effort."

Cir. 1989), *rev'd on other grounds*, 499 U.S. 315 (1991); *Landy v. FDIC*, 486 F.2d 139, 147 (3d Cir. 1973) (citation omitted); *Branch v. FDIC*, 825 F. Supp. 384, 403 (D. Mass. 1993). Indeed, at the time the case was filed, FSA was effectively in the hands of the very entity that needed to be sued in order to vindicate FSA's rights. The court finds that this inherent conflict justified FSC's decision not to demand relief directly from the derivative corporation. Accordingly, FSC may maintain a derivative action.

2. *Direct Action*

Citing *Boyle v. Harries*, 923 P.2d 504 (Kan. Ct. App. 1996), for support, plaintiffs contend that FSA's shareholders also may litigate this lawsuit in their individual capacities. Plaintiffs read *Boyle* too broadly. In that case, the Kansas Court of Appeals recognized an exception to the distinction between derivative and direct shareholder actions merely in the context of closely held corporations. *Id.* at 512-13 (citing *Richards v. Bryan*, 879 P.2d 638, 648-49 (Kan. Ct. App. 1994)). The court did not intend to obliterate the general concept that "a shareholder may only litigate as an individual if the wrong to the corporation inflicts a distinct and disproportionate injury on the shareholder, or if the action involves a contractual right of the shareholder which exists independently of any right of the corporation." *Richards*, 879 P.2d at 646 (citations omitted).

FSA is not a close corporation under Kansas law. Although FSC owns approximately 94% of FSA's outstanding shares, the remaining 6% is owned by FSA's employees under an employee stock ownership plan or is publicly traded on the NASDAQ. K.S.A. § 17-7202(a)(3) states that a corporation cannot be considered

"closely held" if any of its stock has been subject to a public offering. Furthermore, FSC's alleged injuries are neither distinct from those of other FSA shareholders nor predicated upon independent contractual rights. Accordingly, the *Boyle/Richards* exception to direct shareholder actions is not applicable in the instant action. FSC may prosecute this case only in a derivative capacity.

C. *APA Claim*

Turning to the merits of the case, the court first examines plaintiffs' APA claim. In this claim, plaintiffs allege that the RTC exceeded its satutory authority in seizing FSA and in acting as FSA's conservator. Plaintiffs seek both monetary relief and a declaration that the RTC's actions are void.

1. *Monetary Relief*

The court has no jurisdiction over plaintiffs' claim for monetary relief because the APA's waiver of sovereign immunity, 5 U.S.C. § 702, does not apply to actions seeking "money damages." *See Hamilton Stores, Inc. v. Hodel,* 925 F.2d 1272, 1276 (10th Cir. 1991). Plaintiffs attempt to skirt this restriction by arguing that the requested relief is entirely equitable in nature. The court finds this contention unpersuasive.

In *Bowen v. Massachusetts,* 487 U.S. 879 (1988), the Supreme Court undertook a detailed analysis of what constitutes "money damages" for purposes of the APA. In that case, the state of Massachusetts charged that the Department of Health and Human Services improperly refused to contribute to (i.e. reimburse) the state's Medicaid program for certain costs associated with intermediate care facilities for the mentally retarded. In its complaint, the state sought, *inter alia,* an injunction order-

ing the agency to make the requisite contributions. The issue before the Court was whether the APA authorized such relief.

The Court observed initially that the mere fact that a judicial remedy may require the payment of money by one party to another is not a sufficient reason to characterize the relief as money damages. *Id.* at 893. Indeed, a distinction has been recognized consistently between "an action at law for damages—which are intended to provide a victim with monetary compensation for an injury to his person, property, or reputation—and an equitable action for specific relief—which may include an order providing for the reinstatement of an employee with backpay, or for the recovery of specific property or monies." *Id.* The Court held that Congress intended the APA to adhere to this distinction. Thus, the term "money damages" in 5 U.S.C. § 702 "refers to a sum of money used as compensatory relief. Damages are given to the plaintiff to *substitute* for a suffered loss, 'whereas specific remedies are not substitute remedies at all, but [an] attempt to give the plaintiff the very thing to which he was entitled.'" *Id.* at 895 (citing *Maryland Dep't of Human Resources v. Department of Health & Human Servs.*, 763 F.2d 1441, 1446 (D.C. Cir. 1985) (citing Dan B. Dobbs, *Handbook on the Law of Remedies* 135 (1973))).

Applying the *Bowen* principles to the instant action, the court concludes that plaintiffs' request for "the return of the money and money equivalents of FSA's business" is nothing more than a surreptitious attempt to claim money damages in contravention of the APA. What plaintiffs seek is compensation for the diminished value of FSA's assets after being seized by government regulators. Under any definition, such relief is legal—not equitable—in nature.

Plaintiffs place great reliance on *MCorp v. Clarke*, 755 F. Supp. 1402 (N.D. Tex. 1991), in which a bank holding company sued the Comptroller of the Currency and the FDIC for unlawfully closing numerous banks. The court held that the holding company's requested relief was equitable and thus, not barred by the APA's "money damages" prohibition. *Id.* at 1412. This court rejects that holding. First, as defendants correctly point out, most of *MCorp* has been repudiated by the 1989 FIRREA amendments and by *United States v. Gaubert*, 499 U.S. 315 (1991). Second, the purportedly "similar" case upon which *MCorp* predicated its APA discussion, *Texas Am. Bancshares, Inc. v. Clarke*, 740 F. Supp. 1243 (N.D. Tex. 1990), is entirely distinguishable from *MCorp* and in no way supports *MCorp*'s "equitable" findings.[6] In sum, plaintiffs have failed to convince the court that the relief they seek can be described in any way other than "money damages."

2. *Declaratory Relief*

Plaintiffs also seek a declaration that the RTC's actions as conservator of FSA are void.[7] It appears, however, that plaintiffs' request for declaratory relief under the APA is little more than an attempt to make an end-run around the FTCA's exclusive remedy provisions by nominally characterizing their requested relief as equitable in nature. Indeed, the APA and tort claims are inextricably

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[6] The Fifth Circuit later reversed *Clarke* without reaching the "equitable remedy" issue. *See Texas Am. Bancshares, Inc. v. Clarke*, 954 F.2d 329 (5th Cir. 1992).

[7] The Tenth Circuit previously rejected plaintiffs' attacks on the Office of Thrift Supervision's decisions to appoint a conservator for FSA and later replace the conservator with a receiver. *See Franklin I*, 934 F.2d 1127; *Franklin II*, 35 F.3d 1466. Thus, the only matter left for plaintiffs to contest is the RTC's management of FSA in its role as the thrift's conservator.

intertwined; the declaratory relief that plaintiffs seek is not independent from the tort claim, but is merely a means by which to satisfy the tort claim's prima facie elements.

Moreover, even if the APA and FTCA claims were independent and the court declared the RTC's actions void, the only relief available to plaintiffs would be money damages. As noted above, such damages may not be sought under the APA. The case is analogous to *Golden Pacific Bancorp v. Clarke*, 837 F.2d 509 (D.C. Cir. 1988). In *Golden Pacific*, a bank holding company sought review under the APA of the Comptroller of the Currency's decision to declare the bank insolvent and appoint the FDIC as receiver. The holding company also asked for damages under the FTCA. In affirming the dismissal of the case, the District of Columbia Circuit held:

> [Plaintiff] would have us entertain its challenge to the reasonableness of the Comptroller's actions, but neither the APA nor the FTCA permits us. Appellant asserts that a careful review of all the documentation should have led the Comptroller to conclude that the Bank was in fact solvent and that it had sufficient liquidity to meet depositors' demands. But . . . the only relief appellant seeks is money damages; no specific relief under the APA is any longer—if it ever was—at issue. [Plaintiff's] claim under the APA . . . serves only as a device upon which to predicate damages for alleged arbitrary and capricious actions of the Comptroller. This, however, appellant cannot do.

Id. at 88 (footnote omitted). Because plaintiffs may not seek money damages and because their request for declatory relief is improper, the court dismisses plaintiffs' APA claim.

D. *FTCA Claim*

The FTCA generally waives the sovereign immunity of the United States for negligence to the same extent that a private person would be liable in identical circumstances under state law. 28 U.S.C. § 1346(b). Thus, if a negligence claim is based merely on the violation of a federal statute or regulation, no claim will lie under the FTCA unless a similar duty exists under state law. *Klepper v. City of Milford,* 825 F.2d 1440, 1448 (10th Cir. 1987). Defendants insist that plaintiffs cannot establish a prima facie case of negligence under Kansas law because federal regulators, in their capacity as conservator or receiver, owe no duty to the shareholders or directors of a seized thrift. Plaintiffs dispute defendants' conclusion and provide a litany of bases upon which they claim the regulators' duties rest. Defendants' discretionary function defense, however, obviates the need for the court to reach this issue.

The FTCA's sovereign immunity waiver is limited explicitly by the discretionary function exception, which prohibits claims against the United States "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved [was] abused." 28 U.S.C. § 2680(a). Application of the discretionary function, therefore, is a threshold determination—"a jurisdictional issue which precedes any negligence analysis." *Johnson v. United States,* 949 F.2d 332, 335 (10th Cir. 1991); *accord Domme v. United States,* 61 F.3d 787, 789 (10th Cir. 1995) ("Only if the United States waives its sovereign immunity pursuant to the FTCA does the question of whether the government owed the plaintiffs a duty of care under state law arise.").

In determining whether particular government conduct falls within the discretionary function exception, the court applies a two-pronged test. First, the court examines whether the act at issue "involves an element of judgment or choice." *Berkovitz v. United States*, 486 U.S. 531, 536 (1988). "[T]he nature of the conduct, rather than the status of the actor" is the critical factor under this first prong. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984). If a federal statute, regulation, or policy specifically requires a particular course of action, no judgment or choice is implicated and the discretionary function does not apply. *Berkovitz*, 486 U.S. at 536. If, on the other hand, the government's conduct is not controlled by such a directive, the court must proceed to the second prong of the analysis.

In the second step, the court looks at whether the judgment involved "is of the kind that the discretionary function was designed to shield." *Id.* The basis for the exception "was Congress' desire to prevent judicial 'second guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *Id.* at 536-37 (citing *Varig Airlines*, 467 U.S. at 814). Thus, only "governmental actions and decisions based on considerations of public policy" are protected by the discretionary function exception. *Id.* at 537.

The seminal case applying the discretionary function in the thrift industry is *United States v. Gaubert*, 499 U.S. 315 (1991). In that action, a shareholder of an insolvent savings and loan association filed an FTCA suit against the United States, alleging that federal regulators had negligently supervised the thrift's officers and directors as well as the institution's day-to-day operations. The government

sought to dismiss the case on the basis of the FTCA's discretionary function exception. The Court accepted the government's argument.

The Court first noted that decisions made at the operational or management level of a bank are encompassed within the exception:

> A discretionary act is one that involves choice or judgment: there is nothing in that description that refers exclusively to policymaking or planning functions. Day-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest. Discretionary conduct is not confined to the policy or planning level.

Id. at 325. The court then observed that although neither party had identified any formal regulations governing the conduct at issue, the applicable statutory provisions were couched in discretionary terms and "left to the judgment of the agency the decision of when to institute proceedings against a financial institution and which mechanism to use." *Id.* at 329. The Court concluded that the federal regulators' actions had been predicated on "public policy considerations regarding federal oversight of the thrift industry" and, therefore, fell within the discretionary function exception. *Id.* at 332.

In the case at bar, plaintiffs claim that the discretionary function does not apply because the RTC violated numerous mandatory procedures set out in its regulatory manuals and policy directives. (Second Am. Compl. at 14-17.) The court finds plaintiffs' argument unpersuasive. First, none of the manuals or directives that plaintiffs cite require bank regulators to pursue any specific course of action. The materials simply contain definitions, general educational guidelines, and broad objectives for asset man-

agement and disposition. The manuals are highlighted by language of a predominantly precatory nature, implicitly and explicitly vesting RTC officials with wide discretion in determining how to proceed on various subjects. Regulations requiring that agency employees "comprehensively and objectively weigh alternative actions," and "ensure that asset integrity and value are maintained," hardly constitute the type of "specifically prescribed courses of action" necessary to invoke the court's jurisdiction under the FTCA.

Second, the vast majority of plaintiffs' allegations amount to claims that federal regulators, in carrying on the business of FSA, failed to take into account pertinent fiscal information. These averments do not state a claim upon which relief can be granted. "The failure to consider some or all critical aspects of a discretionary judgment does not make that judgment less discretionary and does not make the judgment subject to liability." *Kiehn v. United States,* 984 F.2d 1100, 1105 (10th Cir. 1993). In analyzing the discretionary function exception, the question is not whether the government acted negligently or abused its discretion. Rather, the proper inquiry focuses on whether the government's shortcomings violated specific and mandatory directives. *Daigle v. Shell Oil Co.,* 972 F.2d 1527, 1540-41 (10th Cir. 1992) (citing *Allen v. United States,* 816 F.2d 1417 (10th Cir. 1987)). As noted above, plaintiffs have pointed to no such regulations.

Finally, even if some of the policies that plaintiffs cite could be construed as mandatory, their claims still would not escape the discretionary function exception. For example, plaintiffs contend that the RTC neglected to prepare case memoranda, secure legal opinions, or obtain knowledge of FSA's assets in the manner agency regula-

tions prescribe. There is no allegation, however, that use of such procedures would have changed the outcome of any agency decision. *See Fisher Bros. Sales, Inc. v. United States*, 46 F.3d 279, 285-86 (3d Cir.) (en banc) (alleged violation of mandatory procedures in compiling data upon which ultimate discretionary "injury-causing decision" is predicated does not violate discretionary function exception), *cert. denied sub nom., Julia Saavedra Balmaceda, Inc. v. United States*, 116 S. Ct. 49 (1995). "[T]here is no difference in the quality or quantity of the interference occasioned by judicial second guessing, whether the plaintiff purports to be attacking the data upon which the policy is founded or acknowledges outright that he or she is challenging the policy itself." *Id.* at 286.

Having determined that the RTC's actions involved elements of choice and judgment, the court now must examine whether the discretionary function exception shields that type of judgment. The Supreme Court has stated:

> When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion. For a complaint to survive a motion to dismiss, it must allege facts which would support a finding that the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory scheme.

Gaubert, 499 U.S. at 324-25. This court finds that the discretionary function is well-suited to the instant action.

The objectives of governmental agencies overseeing the thrift industry are often in direct conflict with the officers

and directors of financial institutions. While private officials maintain a loyalty and fiduciary duty to shareholders, federal regulators owe their allegiance to depositors and the general public. If private financial institutions could sue regulatory agencies for negligently performing discretionary functions, the ability of those agencies to act in the public's best interest would be compromised. Sanctioning such suits also would put courts in the difficult, if not impossible, position of judging the propriety of the policymaking acts of a coordinate branch.

The RTC's actions while serving as conservator and receiver of FSA were related directly to public policy considerations regarding federal oversight of the thrift industry. *See Gaubert*, 499 U.S. at 332-33. Indeed, the nature of and inherent discretion underlying the agency's decisions are what drove Congress to enact the discretionary function exception in the first place. *See Dalehite v. United States*, 346 U.S. 15, 26-30 (1953) (describing legislative history of 28 U.S.C. § 2680(a)); *Varig Airlines*, 467 U.S. at 2762-63 (same). The court, therefore, concludes that both prongs of the discretionary function test have been met and the government is insulated from liability with respect to plaintiffs' FTCA claims.

E. *Nongovernmental Activity Claim*

Perhaps anticipating that their tort claims might fall to the discretionary function exception, plaintiffs invite the court to open a gaping hole in FTCA jurisprudence by excluding from the Act's coverage all "nongovernmental activity in commerce." The court declines this invitation.

Plaintiffs predicate their "nongovernmental activity" claim on last year's landmark Supreme Court decision, *United States v. Winstar Corp.*, 116 S. Ct. 2432 (1996). In that case, the Court held that the government's

unilateral revocation of certain favorable accounting methods, originally adopted to facilitate the acquisition of failing thrifts, constituted a breach of contract and entitled the purchasers of the failing thrifts to damages.[8] The Court observed that "[w]hen the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals." *Id.* at 2464-65 (citing *Lynch v. United States*, 292 U.S. 571, 579 (1934)).

Winstar has no applicability to the instant action. That case focuses exclusively on *contractual* obligation that the United States incurred through individualized negotiations with thrifts. *Id.* at 2448-2452. In no way does the opinion suggest that the government subjects itself to limitless *tort* liability any time it enters the domain of commerce. Indeed, such a theory would render much of the FTCA meaningless.

Furthermore, the government's actions in the case at bar cannot be considered "nongovernmental activities." Federal regulators did not "step in the shoes" of FSA's officers and directors; they supplanted them. Although some of the tasks that the RTC undertook in its roles as conservator and receiver of FSA may have been proprietary in nature, the agency ultimately acted in a regulatory capacity pursuant to a regulatory scheme. The agency's objectives were not to maximize profits for the thrift's shareholders, but to protect depositors and replenish the federal depository insurance fund. These objectives, which entail significant policy considerations, could not be accomplished if regulators owed a concomitant duty to the officers and directors of the seized institution.

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[8] Specifically, the Supreme Court held in *Winstar* that the United States, with the passage of FIRREA, had breached its contracts to allow purchased savings and loans to count regulatory goodwill as an asset.

This holding does not mean that the United States always escapes liability in the thrift industry context. FTCA actions still may be maintained against the government for federal regulators' negligence in performing ministerial and non-policy oriented discretionary activities. The discretionary function exception, however, cannot be avoided simply by characterizing government employees' actions as "nongovernmental" in nature.

F. *Tort Claim Against FDIC*

As a final effort at imposing liability on the government, plaintiffs assert common-law tort claims directly against the FDIC. Plaintiffs predicate these claims on 12 U.S.C. § 1441a(b)(9)(E), which empowers the FDIC "[t]o sue and be sued in its corporate capacity in any court of competent jurisdiction." This statute, however, is inapplicable here.

"In order to place torts of 'suable' agencies . . . upon precisely the same footing as torts of 'nonsuable' agencies, Congress, through the FTCA, limited the scope of sue-and-be-sued waivers such as that contained in [the FDIC's] organic statute." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994) (first alteration in original) (citation omitted). Specifically, Congress stated:

> The authority of any federal agency to sue and be sued in its own name shall not be construed to authorize suits against such federal agency on claims which are cognizable under [28 U.S.C. § 1346(b)], and the remedies provided by this title in such cases shall be exclusive.

28 U.S.C. § 2679(a). "Thus, if a suit is 'cognizable' under § 1346(b) of the FTCA, the FTCA remedy is 'exclusive' and the federal agency cannot be sued 'in its

own name,' despite the existence of a sue-and-be-sued clause." *Meyer*, 510 U.S. at 476.

A claim is "cognizable" (i.e., actionable) under section 1346(b) if it alleges each of the requisite elements outlined in the statute's jurisdictional grant. *Id.* at 476-77. Those elements are that: (1) the claim be against the United States, (2) for money damages, (3) for injury or loss of property, or personal injury or death, (4) caused by the negligent or wrongful act or omission of any employee of the Government, (5) while acting within the scope of his office or employment, (6) under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. *Id.* at 477 (citing 28 U.S.C. § 1346(b)(1)).

The court finds that plaintiffs' claims are cognizable under section 1346(b). The thrust of plaintiffs' action is that government regulators negligently seized, operated, and liquidated FSA, thereby breaching their fiduciary duty to conserve and operate the savings association. Such negligence claims against bank receivers are well recognized under Kansas law, *see In re Cedar Vale State Bank*, 894 P.2d 816 (Kan. 1995), and thus fall within the exclusive purview of the FTCA.

Plaintiffs contend that if, as the court held above, the discretionary function exception serves as a jurisdictional bar to their FTCA claims, their common law tort claims against the FDIC cannot be considered cognizable under section 1346(b). The court rejects this argument as it would transform the discretionary function exception into a meaningless provision. Litigants could avoid the force of the statute merely by suing an agency directly. As the Seventh Circuit has observed, "the waiver of sovereign immunity from tort liability of a federal agency or govern-

mental corporation is defined in the Federal Tort Claims Act, and . . . sue-and-be-sued authority does not permit suit outside that Act for torts excepted from coverage of that Act." *FDIC v. Citizens Bank & Trust Co.*, 592 F.2d 364, 371 (7th Cir. 1979); *accord Aviles v. Lutz*, 887 F.2d 1046, 1049 (10th Cir. 1989); *Freeling v. FDIC*, 221 F. Supp. 955, 957 (W.D. Okla. 1962), *aff'd*, 326 F.2d 971 (10th Cir. 1963). Having determined that all of the plaintiffs' tort claims are cognizable under the FTCA, the court dismisses the common law tort claims asserted directly against the FDIC.

IT IS, THEREFORE, BY THE COURT ORDERED that defendants' motion to dismiss (Doc. 59) plaintiffs' second amended complaint is granted.

The case is now closed.

Copies of this order shall be mailed to counsel of record for the parties.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, this 17th day of June, 1997.

/s/ G. T. Van Bebber
G. T. VAN BEBBER
United States District Judge

APPENDIX C

STATUTORY PROVISIONS AND REGULATIONS

1. Section 1254 of Title 28, U.S.C., provides:

§ 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

2. Section 2674 of Title 28, U.S.C., provides:

§ 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

3. Section 2680(a) of Title 28, U.S.C., provides, in relevant part:

§ 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

* * * *

4. Section 1346(b) of Title 28, U.S.C., provides, in relevant part:

§ 1346. United States as defendant

* * * *

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * *

5. Section 1821(d) of Title 12, U.S.C., provides, in relevant part:

§ 1821. Insurance funds; conservatorship and receivership powers of Corporation

* * * *

(d) Powers and duties of Corporation as conservator or receiver

(1) Rulemaking authority of Corporation

The Corporation may prescribe such regulations as the Corporation determines to be appropriate regarding the conduct of conservatorships or receiverships.

(2) General powers

(A) Successor to institution

The Corporation shall, as conservator or receiver, and by operation of law, succeed to—

(i) all rights, titles, powers, and privileges of the insured depository institution, and of any stockholder, member, accountholder, depositor, officer, or director of such institution with respect to the institution and the assets of the institution; and

(ii) title to the books, records, and assets of any previous conservator or other legal custodian of such institution.

(B) Operate the institution

The Corporation may, as conservator or receiver—

(i) take over the assets of and operate the insured depository institution with all the powers of the members or shareholders, the directors, and the officers of the institution and conduct all business of the institution;

(ii) collect all obligations and money due the institution;

(iii) perform all functions of the institution in the name of the institution which is consistent with the appointment as conservator or receiver; and

(iv) preserve and conserve the assets and property of such institution.

(C) Functions of institution's officers, directors, and shareholders

The Corporation may, by regulation or order, provide for the exercise of any function by any

member or stockholder, director, or officer of any insured depository institution for which the Corporation has been appointed conservator or receiver.

(D) Powers as conservator

The Corporation may, as conservator, take such action as may be—

(i) necessary to put the insured depository institution in a sound and solvent condition; and

(ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution.

(E) Additional powers as receiver

The Corporation may, as receiver, place the insured depository institution in liquidation and proceed to realize upon the assets of the institution, having due regard to the conditions of credit in the locality.

(F) Organization of new institutions

The Corporation may, as receiver—

(i) with respect to savings associations and by application to the Director of the Office of Thrift Supervision, organize a new Federal savings association to take over such assets or such liabilities as the Corporation may determine to be appropriate; and

(ii) with respect to any insured bank, organize a new national bank under sub-

section (m) of this section or a bridge bank under subsection (n) of this section.

(G) Merger; transfer of assets and liabilities

(i) In general

The Corporation may, as conservator or receiver—

(I) merge the insured depository institution with another insured depository institution; or

(II) subject to clause (ii), transfer any asset or liability of the institution in default (including assets and liabilities associated with any trust business) without any approval, assignment, or consent with respect to such transfer.

(ii) Approval by appropriate Federal banking agency

No transfer described in clause (i)(II) may be made to another depository institution (other than a new bank or a bridge bank established pursuant to subsection (m) or (n) of this section) without the approval of the appropriate Federal banking agency for such institution.

(H) Payment of valid obligations

The Corporation, as conservator or receiver, shall pay all valid obligations of the insured depository institution in accordance with the prescriptions and limitations of this chapter.

(I) Incidental powers

The Corporation may, as conservator or receiver—

(i) exercise all powers and authorities specifically granted to conservators or receivers, respectively, under this chapter and such incidental powers as shall be necessary to carry out such powers; and

(ii) take any action authorized by this chapter,

which the Corporation determines is in the best interests of the depository institution, its depositors, or the Corporation.

(3) Authority of receiver to determine claims

(A) In general

The Corporation may, as receiver, determine claims in accordance with the requirements of this subsection and regulations prescribed under paragraph (4)(A).

(B) Notice requirements

The receiver, in any case involving the liquidation or winding up of the affairs of a closed depository institution, shall—

(i) promptly publish a notice to the depository institution's creditors to present their claims, together with proof, to the receiver by a date specified in the notice which shall be not less than 90 days after the publication of such notice; and

(ii) republish such notice approximately 1 month and 2 months, respectively, after the publication under clause (i).

(C) Mailing required

The receiver shall mail a notice similar to the notice published under subparagraph (B)(i) at the time of such publication to any creditor shown on the institution's books—

(i) at the creditor's last address appearing in such books; or

(ii) upon discovery of the name and address of a claimant not appearing on the institution's books within 30 days after the discovery of such name and address.

(4) Rulemaking authority relating to determination of claims

The Corporation may prescribe regulations regarding the allowance or disallowance of claims by the receiver and providing for administrative determination of claims and review of such determination.

(5) Procedures for determination of claims

(A) Determination period

(i) In general

Before the end of the 180-day period beginning on the date any claim against a depository institution is filed with the Corporation as receiver, the Corporation shall determine whether to allow or disallow the claim and shall notify the claimant of any determination with respect to such claim.

(ii) Extension of time

The period described in clause (i) may be extended by a written agreement between the claimant and the Corporation.

(iii) Mailing of notice sufficient

The requirements of clause (i) shall be deemed to be satisfied if the notice of any determination with respect to any claim is mailed to the last address of the claimant which appears—

(I) on the depository institution's books;

(II) in the claim filed by the claimant; or

(III) in documents submitted in proof of the claim.

(iv) Contents of notice of disallowance

If any claim filed under clause (i) is disallowed, the notice to the claimant shall contain—

(I) a statement of each reason for the disallowance; and

(II) the procedures available for obtaining agency review of the determination to disallow the claim or judicial determination of the claim.

(B) Allowance of proven claims

The receiver shall allow any claim received on or before the date specified in the notice

published under paragraph (3)(B)(i) by the receiver from any claimant which is proved to the satisfaction of the receiver.

(C) Disallowance of claims filed after end of filing period

(i) In general

Except as provided in clause (ii), claims filed after the date specified in the notice published under paragraph (3)(B)(i) shall be disallowed and such disallowance shall be final.

(ii) Certain exceptions

Clause (i) shall not apply with respect to any claim filed by any claimant after the date specified in the notice pubilshed under paragraph (3)(B)(i) and such claim may be considered by the receiver if—

(I) the claimant did not receive notice of the appointment of the receiver in time to file such claim before such date; and

(II) such claim is filed in time to permit payment of such claim.

(D) Authority to disallow claims

The receiver may disallow any portion of any claim by a creditor or claim of security, preference, or priority which is not proved to the satisfaction of the receiver.

(E) No judicial review of determination pursuant to subparagraph (d)

No court may review the Corporation's determination pursuant to subparagraph (D) to disallow a claim.

(F) Legal effect of filing

(i) Statute of limitation tolled

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions

Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(6) Provision for agency review or judicial determination of claims

(A) In general

Before the end of the 60-day period beginning on the earlier of—

(i) the end of the period described in paragraph (5)(A)(i) with respect to any claim against a depository institution for which the Corporation is receiver; or

(ii) the date of any notice of disallowance of such claim pursuant to paragraph (5)(A)(i),

the claimant may request administrative review of the claim in accordance with subparagraph (A) or (B) of paragraph (7) or file suit on such claim (or continue an action commenced before the appointment of the receiver) in the district or territorial court of the United States for the district within which the depository institution's principal place of business is located or the United States District Court for the District of Columbia (and such court shall have jurisdiction to hear such claim).

(B) Statute of limitations

If any claimant fails to—

(i) request administrative review of any claim in accordance with subparagraph (A) or (B) of paragraph (7); or

(ii) file suit on such claim (or continue an action commenced before the appointment of the receiver),

before the end of the 60-day period described in subparagraph (A), the claim shall be deemed to be disallowed (other than any portion of such claim which was allowed by the receiver) as of the end of such period, such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(7) Review of claims

(A) Administrative hearing

If any claimant requests review under this subparagraph in lieu of filing or continuing any

action under paragraph (6) and the Corporation agrees to such request, the Corporation shall consider the claim after opportunity for a hearing on the record. The final determination of the Corporation with respect to such claim shall be subject to judicial review under chapter 7 of Title 5.

(B) Other review procedures

(i) In general

The Corporation shall also establish such alternative dispute resolution processes as may be appropriate for the resolution of claims filed under paragraph (5)(A)(i).

(ii) Criteria

In establishing alternative dispute resolution processes, the Corporation shall strive for procedures which are expeditious, fair, independent, and low cost.

(iii) Voluntary binding or nonbinding procedures

The Corporation may establish both binding and nonbinding processes, which may be conducted by any government or private party, but all parties, including the claimant and the Corporation, must agree to the use of the process in a particular case.

(iv) Consideration of incentives

The Corporation shall seek to develop incentives for claimants to participate in the alternative dispute resolution process.

(8) Expedited determination of claims

(A) Establishment required

The Corporation shall establish a procedure for expedited relief outside of the routine claims process established under paragraph (5) for claimants who—

(i) allege the existence of legally valid and enforceable or perfected security interests in assets of any depository institution for which the Corporation has been appointed receiver; and

(ii) allege that irreparable injury will occur if the routine claims procedure is followed.

(B) Determination period

Before the end of the 90-day period beginning on the date any claim is filed in accordance with the procedures established pursuant to subparagraph (A), the Corporation shall—

(i) determine—

(I) whether to allow or disallow such claim; or

(II) whether such claim should be determined pursuant to the procedures established pursuant to paragraph (5); and

(ii) notify the claimant of the determination, and if the claim is disallowed, a statement of each reason for the disallowance and the procedure for obtaining agency review or judicial determination.

(C) Period for filing or renewing suit

Any claimant who files a request for expedited relief shall be permitted to file a suit, or to continue a suit filed before the appointment of the receiver, seeking a determination of the claimant's rights with respect to such security interest after the earlier of—

(i) the end of the 90-day period beginning on the date of the filing of a request for expedited relief; or

(ii) the date the Corporation denies the claim.

(D) Statute of limitations

If an action described in subparagraph (C) is not filed, or the motion to renew a previously filed suit is not made, before the end of the 30-day period beginning on the date on which such action or motion may be filed in accordance with subparagraph (B) the claim shall be deemed to be disallowed as of the end of such period (other than any portion of such claim which was allowed by the receiver), such disallowance shall be final, and the claimant shall have no further rights or remedies with respect to such claim.

(E) Legal effect of filing

(i) Statute of limitation tolled

For purposes of any applicable statute of limitations, the filing of a claim with the receiver shall constitute a commencement of an action.

(ii) No prejudice to other actions

Subject to paragraph (12), the filing of a claim with the receiver shall not prejudice any right of the claimant to continue any action which was filed before the appointment of the receiver.

(9) Agreement as basis of claim

(A) Requirements

Except as provided in subparagraph (B), any agreement which does not meet the requirements set forth in section 1823(e) of this title shall not form the basis of, or substantially comprise, a claim against the receiver or the Corporation.

(B) Exception to contemporaneous execution requirement

Notwithstanding section 1823(e)(2) of this title, any agreement relating to an extension of credit between a Federal home loan bank or Federal Reserve bank and any insured depository institution which was executed before the extension of credit by such bank to such institution shall be treated as having been executed contemporaneously with such extension of credit for purposes of subparagraph (A).

(10) Payment of claims

(A) In general

The receiver may, in the receiver's discretion and to the extent funds are available, pay creditor claims which are allowed by the receiver,

approved by the Corporation pursuant to a final determination pursuant to paragraph (7) or (8), or determined by the final judgment of any court of competent jurisdiction in such manner and amounts as are authorized under this chapter.

(B) Payment of dividends on claims

The receiver may, in the receiver's sole discretion, pay dividends on proved claims at any time, and no liability shall attach to the Corporation (in such Corporation's corporate capacity or as receiver), by reason of any such payment, for failure to pay dividends to a claimant whose claim is not proved at the time of any such payment.

(11) Distribution of assets

(A) Subrogated claims; claims of uninsured depositors and other creditors

The receiver shall—

(i) retain for the account of the Corporation such portion of the amounts realized from any liquidation as the Corporation may be entitled to receive in connection with the subrogation of the claims of depositors; and

(ii) pay to depositors and other creditors the net amounts available for distribution to them.

(B) Distribution to shareholders of amounts remaining after payment of all other claims and expenses

In any case in which funds remain after all depositors, creditors, other claimants, and administrative expenses are paid, the reeciver shall distribute such funds to the depository institution's shareholders or members together with the accounting report required under paragraph (14)(C).

(12) Suspension of legal actions

(A) In general

After the appointment of a conservator or receiver for an insured depository institution, the conservator or receiver may request a stay for a period not to exceed—

(i) 45 days, in the case of any conservator; and

(ii) 90 days, in the case of any receiver,

in any judicial action or proceeding to which such institution is or becomes a party.

(B) Grant of stay by all courts required

Upon receipt of a request by any conservator or receiver pursuant to subparagraph (A) for a stay of any judicial action or proceeding in any court with jurisdiction of such action or proceeding, the court shall grant such stay as to all parties.

(13) Additional rights and duties

(A) Prior final adjudication

The Corporation shall abide by any final unappealable judgment of any court of competent jurisdiction which was rendered before the ap-

pointment of the Corporation as conservator or receiver.

(B) Rights and remedies of conservator or receiver

In the event of any appealable judgment, the Corporation as conservator or receiver shall—

(i) have all the rights and remedies available to the insured depository institution (before the appointment of such conservator or receiver) and the Corporation in its corporate capacity, including removal to Federal court and all appellate rights; and

(ii) not be required to post any bond in order to pursue such remedies.

(C) No attachment or execution

No attachment or execution may issue by any court upon assets in the possession of the receiver.

(D) Limitation on judicial review

Except as otherwise provided in this subsection, no court shall have jurisdiction over—

(i) any claim or action for payment from, or any action seeking a determination of rights with respect to, the assets of any depository institution for which the Corporation has been appointed receiver, including assets which the Corporation may acquire from itself as such receiver; or

(ii) any claim relating to any act or omission of such institution or the Corporation as receiver.

(14) Statute of limitations for actions brought by conservator or receiver

(A) In general

Notwithstanding any provision of any contract, the applicable statute of limitations with regard to any action brought by the Corporation as conservator or receiver shall be—

(i) in the case of any contract claim, the longer of—

(I) the 6-year period beginning on the date the claim accrues; or

(II) the period applicable under State law; and

(ii) in the case of any tort claim, the longer of—

(I) the 3-year period beginning on the date the claim accrues; or

(II) the period applicable under State law.

(B) Determination of the date on which a claim accrues

For purposes of subparagraph (A), the date on which the statute of limitation begins to run on any claim described in such subparagraph shall be the later of—

(i) the date of the appointment of the Corporation as conservator or receiver; or

(ii) the date on which the cause of action accrues.

(15) Accounting and recordkeeping requirements

(A) In general

The Corporation as conservator or receiver shall, consistent with the accounting and reporting practices and procedures established by the Corporation, maintain a full accounting of each conservatorship and receivership or other disposition of institutions in default.

(B) Annual accounting or report

With respect to each conservatorship or receivership to which the Corporation was appointed, the Corporation shall make an annual accounting or report, as appropriate, available to the Secretary of the Treasury, the Comptroller General of the United States, and the authority which appointed the Corporation as conservator or receiver.

(C) Availability of reports

Any report prepared pursuant to subparagraph (B) shall be made available by the Corporation upon request to any shareholder of the depository institution for which the Corporation was appointed conservator or receiver or any other member of the public.

(D) Recordkeeping requirement

After the end of the 6-year period beginning on the date the Corporation is appointed as receiver of an insured depository institution, the Corporation may destroy any records of such institution which the Corporation, in the Corporation's discretion, determines to be unnecessary

unless directed not to do so by a court of competent jurisdiction or governmental agency, or prohibited by law.

(16) Contracts with state housing finance authorities

(A) In general

The Corporation may enter into contracts with any State housing finance authority for the sale of mortgage-related assets (as such terms are defined in section 1441a-1 of this title) of any depository institution in default (including assets and liabilities associated with any trust business), such contracts to be effective in accordance with their terms without any further approval, assignment, or consent with respect thereto.

(B) Factors to consider

In evaluating the disposition of mortgage related assets to any State housing finance authority the Corporation shall consider—

(i) the State housing finance authority's ability to acquire and service current, delinquent, and defaulted mortgage related assets;

(ii) the State housing finance authority's ability to further national housing policies;

(iii) the State housing finance authority's sensitivity to the impact of the sale of mortgage related assets upon the State and local communities;

(iv) the costs to the Federal Government associated with alternative ownership

or dispositions of the mortgage related assets;

(v) the minimization of future guaranties which may be required of the Federal Government;

(vi) the maximization of mortgage related asset values; and

(vii) the utilization of institutions currently established in mortgage related asset market activities.

* * * *

6. Section 106 of Title 11, U.S.C., provides:

§ 106. Waiver of sovereign immunity

(a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.

(b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.

(c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—

(1) a provision of this title that contains "creditor", "entity", or "governmental unit" applies to governmental units; and

(2) a determination by the court of an issue arising under such a provision binds governmental units.

7. Section 1653 of Title 28, U.S.C., provides:

§ 1653. Amendment of pleadings to show jurisdiction

Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

Supreme Court, U.S.
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No. 99-208

In the Supreme Court of the United States

FRANKLIN SAVINGS CORPORATION, ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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1809

QUESTIONS PRESENTED

1. Whether the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. 2680(a), bars petitioners' tort claims.

2. Whether conduct by federal officials acting pursuant to statutory authority as conservator of a financial institution is "non-governmental" commercial activity that renders inapplicable the discretionary function exception of the Federal Tort Claims Act.

3. Whether the court of appeals erred in declining to consider petitioners' argument, raised for the first time in the court of appeals, that 11 U.S.C. 106 waives the government's sovereign immunity from this lawsuit.

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-36a) is reported at 180 F.3d 1124. The memorandum and order of the district court (Pet. App. 37a-59a) are reported at 970 F. Supp. 855.

JURISDICTION

The judgment of the court of appeals was entered on May 4, 1999. The petition for a writ of certiorari was filed on August 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This is a tort action arising out of the failure of Franklin Savings Association (FSA), a state-chartered savings and loan association. See Pet. App. 38a. Peti-

tioners FSA and Franklin Savings Corporation (FSC), which owned approximately 94% of FSA's stock (*ibid.*), seek to recover damages from the United States for actions taken by the Resolution Trust Corporation (RTC) while it was acting as conservator of FSA.

1. In 1990, the Director of the Office of Thrift Supervision "determined that FSA was 'in an unsafe and unsound condition to transact business'" and appointed RTC to serve as conservator of the institution. Pet. App. 3a. FSA and FSC filed a lawsuit seeking removal of the conservator. The district court held that the appointment was arbitrary and capricious, but the court of appeals sustained the Director's decision. *Ibid.*; see *Franklin Sav. Ass'n* v. *Director of the Office of Thrift Supervision*, 742 F. Supp. 1089, 1126 (D. Kan. 1990), rev'd, 934 F.2d 1127, 1149 (10th Cir. 1991), cert. denied, 503 U.S. 937 (1992).

In July 1992, the Director converted RTC's role from that of conservator to receiver and ordered RTC to liquidate FSA. Pet. App. 3a; see 57 Fed. Reg. 41,969 (1992). Both FSA and FSC filed a lawsuit challenging that decision. The court of appeals affirmed the dismissal of that suit on the ground that the Director's decision was not subject to judicial review. Pet. App. 3a; see *Franklin Sav. Ass'n* v. *Office of Thrift Supervision*, 35 F.3d 1466, 1469-1471 (10th Cir. 1994).

2. In July 1991, FSC filed a petition for relief under Chapter 11 of the Bankruptcy Code (11 U.S.C. 1101 *et seq.*) in the United States Bankruptcy Court for the District of Kansas. C.A. App. 61 para. 1. Petitioners filed a complaint in that proceeding against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2674, alleging claims of negligence, breach of fiduciary duty, and conversion by RTC while acting as conservator. Pet. App. 39a. In March 1995,

the case was transferred to the United States District Court for the District of Kansas. *Ibid.*

Petitioners later filed a second amended complaint, which named as an additional defendant the Federal Deposit Insurance Corporation, the successor-in-interest to RTC. Pet. App. 39a-40a.[1] Petitioners also added a claim under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, alleging that RTC, as conservator, had acted beyond its statutory authority. Pet. App. 40a. Moreover, petitioners added a claim for breach of duty based on alleged "non-governmental activity in commerce" undertaken by RTC while acting as conservator of FSA. *Ibid.*

3. The district court granted the government's motion to dismiss the second amended complaint. Pet. App. 37a-59a. The court held that FSA's failure to file an administrative tort claim precluded it from pursuing relief under the FTCA. *Id.* at 42a. The court also held that FSC could not pursue claims asserted on its own behalf because it alleged no injury independent of that suffered by FSA. *Id.* at 45a-46a. The court held, however, that FSC could pursue relief on behalf of FSA in the form of a shareholder derivative suit. *Id.* at 43a-45a.[2]

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[1] On December 31, 1995, the Federal Deposit Insurance Corporation (FDIC) succeeded RTC as receiver in accordance with the Resolution Trust Corporation Completion Act, 12 U.S.C. 1441a(m)(1).

[2] The court further held that petitioners could not seek monetary relief under the APA because that statute applies only to actions seeking relief *other* than "money damages." Pet. App. 46a (quoting 5 U.S.C. 702). And the court found petitioners' request for declaratory relief under the APA to be "little more than an attempt to make an end-run around the FTCA's exclusive remedy

The court also held that the discretionary function exception barred petitioners' FTCA claims (Pet. App. 50a-55a), including those submitted by FSC on behalf of FSA. The court determined that "the RTC's actions involved elements of choice and judgment," *id.* at 54a, and "were related directly to public policy considerations regarding federal oversight of the thrift industry," *id.* at 55a.

The court also dismissed petitioners' claim based on allegations that RTC was engaged in non-governmental commercial activity. The court declined "to open a gaping hole in FTCA jurisprudence by excluding from the Act's coverage all 'nongovernmental activity in commerce.'" Pet. App. 55a. The court also concluded that the actions of federal regulators in this case "cannot be considered 'nongovernmental activities.'" *Id.* at 56a.[3]

4. The court of appeals affirmed. Pet. App. 1a-36a. The court held that petitioners had waived their argument, made for the first time on appeal, that a provision of the Bankruptcy Code, 11 U.S.C. 106, furnished an independent waiver of the government's sovereign immunity from this suit. Pet. App. 6a-8a. The court further held that petitioners' claims against the United States are barred by the discretionary function exception. *Id.* at 8a-34a.[4]

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provisions by nominally characterizing their requested relief as equitable in nature." Pet. App. 48a.

[3] The court further determined that petitioners could not assert common-law tort claims directly against the FDIC. The court held that petitioners' claims are "cognizable" under 28 U.S.C. 1346(b) and that the FTCA therefore provides the exclusive basis for seeking relief. Pet. App. 57a-59a; see 28 U.S.C. 2679(a).

[4] The court of appeals also held that the FTCA bars petitioners' tort claims against the FDIC. Pet. App. 35a-36a. The court did not address several other issues. *Id.* at 5a n.5.

ARGUMENT

The court of appeals correctly affirmed the dismissal of petitioners' tort claims. The court's decision does not conflict with any decision of this Court or any other court of appeals. This Court's review is therefore not warranted.

1. a. The FTCA is a limited waiver of sovereign immunity for certain tort actions against the United States. See 28 U.S.C. 1346(b), 2674. A principal limitation on that waiver of immunity is the discretionary function exception, which immunizes the United States from tort liability for discretionary policy choices made by its employees. Under that exception, courts may not hold the United States liable for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a).

An action is protected by the exception if (1) "it involves an element of judgment or choice," and (2) the judgment "is of the kind that the discretionary function exception was designed to shield." *Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988). The first step of the inquiry focuses on whether a "federal statute, regulation, or policy *specifically prescribes* a course of action" as to the decision at issue. *Ibid.* (emphasis added). The second step of the inquiry focuses "on the nature of the actions taken and on whether they are susceptible to policy analysis." *United States* v. *Gaubert*, 499 U.S. 315, 325 (1991); see also *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 814 (1984) (exception prevents "judicial

'second-guessing'" of decisions "grounded in social, economic, and political policy").

The court of appeals correctly held that RTC's management of FSA's affairs as its conservator satisfied both requirements for application of the discretionary function exception. In *Gaubert*, this Court held that the discretionary function exception protects a wide variety of decisions rendered by federal officials in the course of supervising a troubled financial institution. As the Court explained, "[d]ay-to-day management of banking affairs, like the management of other businesses, regularly requires judgment as to which of a range of permissible courses is the wisest." 499 U.S. at 325. Like the actions of the federal regulators in *Gaubert*, RTC's actions at issue here in selling certain of FSA's assets plainly "involved the exercise of choice and judgment." *Id.* at 331. And, in exercising that judgment, RTC, like the regulators in *Gaubert*, was implementing the congressional and regulatory policies of preserving the federal insurance fund and promoting continued public confidence in the banking system. See *id.* at 332; Pet. App. 56a. Thus, RTC's operational decisions at issue here as conservator of FSA involved "the kind of policy judgment that the discretionary function exception was designed to shield." 499 U.S. at 332.

b. Petitioners concede that "the management and operation of a financial institution entails the exercise of discretion on a regular and ongoing basis" and do not contest that RTC's actions involved the exercise of "policy judgment." Pet. 9. Petitioners contend (Pet. 6-13), however, that RTC's actions were not protected by the discretionary function exception because "RTC's conduct was a direct violation of its mandate." Pet. 7. That contention lacks merit.

RTC was created as part of Congress's response to the "deteriorating condition of the thrift industry" in the United States. H.R. Rep. No. 54, 101st Cong., 1st. Sess. Pt. 1, at 304 (1989). Congress authorized the Director of the Office of Thrift Supervision to appoint RTC to serve as conservator of troubled savings and loan associations, see 12 U.S.C. 1464(d)(2), and vested RTC with broad statutory authority. RTC generally was given "the same powers and rights" with respect to thrift institutions within its jurisdiction as the FDIC was given under 12 U.S.C. 1821, 1822, and 1823 with respect to depository institutions insured by the FDIC. 12 U.S.C. 1441a(b)(4)(A). Accordingly, RTC as conservator was authorized to "take such action as may be (i) necessary to put the insured depository institution in a sound and solvent condition; and (ii) appropriate to carry on the business of the institution and preserve and conserve the assets and property of the institution." 12 U.S.C. 1821(d)(2)(D). RTC was further authorized to "(i) exercise all powers and authorities specifically granted to conservators * * * under [Chapter 16 of Title 12] and such incidental powers as shall be necessary to carry out such powers; and (ii) take any action authorized by [Chapter 16 of Title 12], which [RTC] determines is in the best interests of the depository institution, its depositors, or [RTC]." 12 U.S.C. 1821(d)(2)(J); see 12 U.S.C. 1441a(b)(4)(A).

Despite RTC's broad statutory discretion, petitioners claim that RTC exceeded its authority as conservator by commencing "a course of conduct that constituted a liquidation of FSA's business." Pet. 6. But the facts alleged in petitioners' complaint do not demonstrate that RTC acted outside its authority. Although petitioners referred to RTC's sale of certain securities and other assets held by FSA, Congress expressly per-

mitted RTC as conservator to sell assets of institutions over which it exercised authority. See 12 U.S.C. 1821(d)(2)(G)(i)(II); 12 U.S.C. 1441a(b)(4)(A); see also C.A. App. 203 (RTC, *Conservator's Operating Manual* (Jan. 1992)) (referring to "strategies for marketing and disposing of assets in a manner that expedites asset sales, and prepares conservatorships for eventual sale or resolution"). Petitioners failed to explain how the asset sales and other alleged conduct exceeded RTC's authority or why the conduct constituted an impermissible "liquidation" for purposes of federal law.[5]

In essence, petitioners contend that RTC abused its discretion by exercising its broad authority in a manner that ultimately made it necessary to liquidate FSA. But the discretionary function exception by its terms applies "whether or not the discretion involved be abused." 28 U.S.C. 2680(a); see also *Gaubert*, 499 U.S.

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[5] After holding that RTC's conduct was "facially authorized" (Pet. App. 18a), the court of appeals further considered whether the conduct nonetheless could be challenged under the FTCA if it was performed in bad faith. The court of appeals concluded that the discretionary function exception bars such a challenge and establishes what "amounts to an irrebuttable presumption that an employee ordered or required by law to perform a discretionary function, and whose acts are facially consistent with that function, did try in good faith to perform it." *Id.* at 33a. Even if the discretionary function exception does not create an irrebuttable presumption of good faith, the court of appeals correctly dismissed petitioners' claims. As the court of appeals recognized (*Id.* at 11a-18a), RTC had the discretion as conservator to engage in the asset sales and other conduct alleged in the complaint. And it is well established that the conduct of government officials is accorded a rebuttable presumption of regularity. See, *e.g.*, *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991); *United States* v. *Chemical Found.*, 272 U.S. 1, 14-15 (1926). Petitioners made no specific allegations to rebut that presumption.

at 338 (Scalia, J., concurring in part and concurring in the judgment). Thus, even if RTC abused its discretion in a way that led to FSA's liquidation, that would not give rise to a cause of action under the FTCA.

c. Petitioners also contend that they "asserted violations of specific, mandatory policies." Pet. 11; see also Pet. 7 (referring to "specific, detailed violations of mandatory rules"). The court of appeals, however, held that "most of the requirements on which [petitioners] focus are not specific and mandatory" (Pet. App. 12a) but state only "general goals, or sets of objectives to balance" (*id.* at 13a). The court identified one policy statement that might qualify as a "specific and mandatory directive" (*id.* at 14a) but concluded that petitioners had not alleged that RTC's purported disregard of that directive caused them any injury. *Id.* at 14a-17a. The court of appeals therefore correctly concluded that petitioners had not alleged that RTC acted contrary to a "course of action" "specifically prescribe[d]" by a "federal statute, regulation, or policy" so as to remove its conduct from the discretionary function exception. See *Berkovitz*, 486 U.S. at 536.

Thus, contrary to petitioners' contention (Pet. 9-10), this case is quite different from *Berkovitz*. In *Berkovitz*, a specific statute and regulation made clear that federal officials could not issue a license for the production of an oral polio vaccine without first receiving relevant test data from the manufacturer. 486 U.S. at 541, 542. In addition, a statute and a regulation expressly provided that such licenses could be issued only upon a showing that the products satisfy applicable regulatory standards. *Id.* at 541-542. In light of those particularized mandates, the Court held that the discretionary function exception would not bar a claim based on a decision to issue a license without having

received the required data. *Id.* at 543. The Court also held that the discretionary function exception would not bar claims based on allegations that a license was approved (1) without first determining whether the vaccine complied with regulatory standards or (2) after determining that the vaccine did not comply with such standards. *Id.* at 543-544. Here, by contrast, petitioners' alleged injuries were not caused by a failure to adhere to specific and mandatory statutory or regulatory provisions that removed discretion from RTC employees.

2. Petitioners next claim (Pet. 13-17) that the decision of the court of appeals conflicts with this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996). Petitioners are incorrect.

Winstar involved the scope of the government's liability with respect to claims under *contract* rather than tort law. The plurality in *Winstar* noted that the government is held to many of the same contractual responsibilities as private parties, observing that "when the United States 'comes down from its position of sovereignty, and enters the domain of commerce, it submits itself to the same laws that govern individuals there.'" 518 U.S. at 895 n.39 (opinion of Souter, J., joined by Stevens, O'Connor, & Breyer, JJ.) (quoting *Cooke* v. *United States*, 91 U.S. 389, 398 (1875)).

By contrast, when, as here, the government performs discretionary regulatory functions, there is no remedy in tort for persons who allege to have been adversely affected. That is the very purpose of the discretionary function exception. See *Gaubert*, 499 U.S. at 323; *Varig Airlines*, 467 U.S. at 813-814. The Court's decision in *Winstar* did not alter the scope of the government's liability under the FTCA. See Pet. App. 35a.

Petitioners err in asserting (Pet. 14) that the actions of RTC as conservator were "non-governmental" in character. As the court of appeals recognized, the "central premise" of this Court's decision in *Gaubert* was that "oversight of financial institutions generally entails discretion of the sort protected by the [discretionary function] exception." Pet. App. 35a. And, as the district court concluded, "[a]lthough some of the tasks that the RTC undertook in its roles as conservator and receiver of FSA may have been proprietary in nature, the agency ultimately acted in a regulatory capacity pursuant to a regulatory scheme." *Id.* at 56a. Indeed, the RTC was vested with express statutory authority to serve as conservator of institutions such as FSA. See 12 U.S.C. 1464(d)(2).

Petitioners' reliance (Pet. 15-16) on *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), is misplaced. The Court in that case refused to recognize a distinction between "governmental" and "non-governmental" conduct for purposes of determining liability under the FTCA. *Id.* at 65-68. And, as the Court subsequently made clear, the decision in *Indian Towing* was based on the conclusion that the conduct under challenge "did not involve any permissible exercise of policy judgment." *Gaubert*, 499 U.S. at 326. Here, by contrast, RTC's conduct was discretionary and susceptible to policy analysis for the reasons discussed above.

3. Finally, petitioners contend (Pet. 17-24) that the court of appeals erroneously refused to consider their argument that a provision of the Bankruptcy Code, 11 U.S.C. 106, waives the government's sovereign immunity with respect to the claims presented in this case. Petitioners made that argument for the first time in the court of appeals and, in fact, asserted a directly contrary position in the bankruptcy court. See Mem. in

Opp. to Def.'s Mot. to Dismiss at 6, *Franklin Sav. Corp.* v. *United States*, No. 93-7001 (Bankr. D. Kan. Jan. 18, 1994) ("Section 106 does not and cannot apply to claims originating under non-bankruptcy law. FSC's claims here derive from the Federal Tort Claims Act which explicitly waives sovereign immunity."). The court of appeals acted well within its discretion in declining to consider petitioners' argument.

Petitioners place principal reliance (Pet. 17-19) on cases in which courts have resolved challenges to subject matter jurisdiction raised for the first time on appeal. As the court of appeals recognized (Pet. App. 6a-7a), however, those cases involve fundamentally different concerns from those presented here. "Federal courts are courts of limited jurisdiction." *Kokkonen* v. *Guardian Life Ins. Co. of America*, 511 U.S. 375, 377 (1994); see *Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986). To ensure that the judiciary does not exceed the limitations on its authority, the general rule against entertaining arguments raised for the first time on appeal is relaxed, and an argument that a court lacks subject matter jurisdiction can be raised at any point in the litigation. See, *e.g.*, *Jefferson* v. *City of Tarrant*, 522 U.S. 75 (1997). Indeed, the limits are so fundamental that they "must be policed by the courts on their own initiative even at the highest level." *Ruhrgas AG* v. *Marathon Oil Co.*, 119 S. Ct. 1563, 1570 (1999).

Here, however, petitioners do not contend that the courts lack subject matter jurisdiction. To the contrary, petitioners argue that Section 106 is an independent waiver that can *support* the exercise of jurisdiction over their tort claims. The court of appeals had the discretion to treat that contention just as it would any non-jurisdictional argument raised for the first time on

appeal. The court of appeals' application in this case of the general rule against consideration of such arguments absent extraordinary circumstances does not warrant this Court's review.

Petitioners also rely (Pet. 19-21) on cases holding that an appellate court may, in its discretion, consider bases for subject matter jurisdiction that were not formally asserted in the complaint or raised in the trial court. Similarly, petitioners cite cases (Pet. 20) recognizing the more general principle that an appellate court may, in its discretion, consider legal arguments raised for the first time on appeal. That an appellate court has such discretion is, of course, in no way inconsistent with its decision not to exercise that discretion, the decision that the court of appeals made here.

Petitioners' reliance (Pet. 22-24) on 28 U.S.C. 1653 is misplaced for the same reason. Section 1653 provides that "[d]efective allegations of jurisdiction *may* be amended, upon terms, in the trial or appellate courts." 28 U.S.C. 1653 (emphasis added). The statute is phrased in permissive rather than mandatory language. Even assuming that Section 1653 provided the court of appeals with the authority to consider petitioners' legal argument, that statute did not require the court of appeals to exercise that authority.[6]

In any event, petitioners' argument that Section 106 can be invoked to circumvent limitations on the waiver of immunity in the FTCA lacks merit. Although Section 106 is a waiver of sovereign immunity inde-

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[6] It is not clear that Section 1653 governs the consideration of petitioners' new *legal* argument. The statute's central concern is the correction of inadequate *factual allegations* made in support of jurisdiction. See *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826, 830-832 (1989).

pendent of the FTCA, that waiver does not create substantive rights or expose governmental units to previously unrecognized liabilities. To the contrary, Congress has explicitly provided that "[n]othing in [Section 106] shall create any substantive claim for relief or cause of action not otherwise existing under this title, the Federal Rules of Bankruptcy Procedure, or nonbankruptcy law." 11 U.S.C. 106(a)(5). And both the House and Senate reports accompanying the original enactment of Section 106 stated that the statute was intended to "achieve approximately the same result that would prevail outside of bankruptcy." H.R. Rep. No. 595, 95th Cong., 1st Sess. 317 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 29-30 (1978). In enacting Section 106, Congress did not intend to enable a debtor to manufacture a tort action against the United States that would otherwise not exist by filing for bankruptcy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE
Supreme Court of the United States

FRANKLIN SAVINGS CORPORATION AND
FRANKLIN SAVINGS ASSOCIATION,
Petitioners,

v.

UNITED STATES OF AMERICA AND
FEDERAL DEPOSIT INSURANCE CORPORATION,
as successor-in-interest to the
Resolution Trust Corporation,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners submit the following Reply to three points raised by Respondents; the balance of Respondents' contentions are dealt with in the Petition.

I. RESPONDENTS' ASSERTION THAT "EVEN IF THE RTC ABUSED ITS DISCRETION IN A WAY THAT LED TO FSA'S LIQUIDATION, THAT WOULD NOT GIVE RISE TO A CAUSE OF ACTION UNDER THE FTCA."

On February 15, 1990, the Director of the OTS ordered that FSA be placed into conservatorship and appointed

the RTC as conservator "not for the purpose of liquidation . . ." (the "Order"). Petitioners allege that immediately after the RTC's appointment and in violation of the mandate of the Order, the RTC began a course of conduct to liquidate FSA.[1]

Notwithstanding the specific policy directive that the RTC was not to liquidate, the government now argues that "even if the RTC abused its discretion in a way that led to FSA's liquidation, that would not give rise to a cause of action under the FTCA." (Resp. Br. at p. 9.) It is this very argument that makes the Tenth Circuit precedent dangerous and points the way to why this Court should grant the Petition.

Simply stated, the government believes, as Petitioners warned in their Petition, that under the Tenth Circuit opinion, an agency has discretion to disobey a specific mandate.

If the lower court decision is permitted to stand, (i) the holding of this Court in *Gaubert* and *Berkovitz* that immunity does not exist for conduct that violates a specific mandate will be rendered infirm, (ii) the discretionary function exception to the FTCA will swallow the entire statute, and (iii) agencies heretofore expected to obey specific mandates can, with the impunity of a despot, disregard the policy considerations underlying the mandate and proceed unfettered.

In its analysis, Respondents nowhere address the key point in this litigation: The Order appointing the RTC as

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[1] Since this is an appeal from an Order of Dismissal under Rule 12(b)(6), Petitioners' allegations that the RTC engaged in a liquidation of the FSA that began immediately upon its appointment as conservator are considered to be true. Those portions of Respondents' brief challenging whether the RTC commenced and carried out a liquidation should be disregarded at this point.

conservator specifically directed that the RTC could not liquidate FSA. Certainly, the Director of the Office of Thrift Supervision had broad power in deciding what supervisory action, if any, would be imposed on FSA. The OTS Director's decision is a perfect example of the exercise of "judgment as to which a range of permissible courses is the wisest." [2] After reviewing the OTS Administrative Record, the Director chose a course of action and issued an official Order documenting that policy choice. He chose conservatorship rather than receivership and specifically ordered that the conservatorship was "not for the purpose of liquidation."

In view of the Order, any "policy choice" by the RTC to engage in conduct that amounts to a liquidation is the act of a despot, not the act of a governmental agency following the law. Liquidation was clearly not within the "range of permissible courses" available to the RTC.

The social interest and policy favoring the rule of law is heavily at stake in this case. The Petition should be granted so that agencies will know that in their dealings with the private sector, the courts will not allow them to run amok, but rather will insist on adherence to the mandates that define and, in this case, restrain their conduct.

II. RESPONDENTS' ASSERTION THAT THE RTC WAS ACTING IN A REGULATORY CAPACITY WITH RESPECT TO THE CONDUCT GIVING RISE TO PETITIONERS' CLAIMS.

In *United States v. Winstar*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964, 1004 n.39 (1996), this Court recognized that the government is not shielded from lia-

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[2] *Gaubert v. United States*, 499 U.S. 315, 325, 111 S. Ct. 1267, 113 L. Ed. 2d 335 (1991).

bility when it steps down from its governmental functions and enters the domain of commerce as a private citizen. Although *Winstar* arose in a contract setting, the Court did not limit it to contract cases; to the contrary, the broad language in note 39 is highly suggestive of an expansive interpretation. Respondents would like *Winstar* to be narrowly construed so government agencies running private companies can do whatever they desire with impunity, no matter what damage is visited on private commercial entities in the process. However, the policy underlying *Winstar* is to put the government on a level playing field with other private actors when the government enters commerce, not as a regulator, but as a business participant.

Respondents also suggest that since the defendant in *Gaubert* was found to be involved in oversight of financial institutions generally, then the RTC in this case must have been similarly engaged. The logic of Respondents' regulatory capacity argument, however, is flawed. In *Gaubert*, the actions complained of were those of the financial institution's regulator, the Federal Home Loan Bank Board (FHLBB). Furthermore, those actions related to the FHLBB's duty to supervise and regulate that financial institution. The FHLBB retained its supervisory role and did not take over and actually operate the business. In the instant case, FSA's regulator was the OTS. The RTC never assumed or occupied a regulatory position or capacity. Rather, the RTC was carrying on the non-regulatory function of *operating* a savings and loan. The RTC entered commerce and supplanted FSA's board of directors and officers. It occupied the capacity that theretofore had been carried on by private citizens. Such conduct is not, and should not be, shielded by government immunity.

III. RESPONDENTS' ASSERTION THAT 28 U.S.C. § 1653 IS DISCRETIONARY AND PERMISSIVE.

Contrary to Respondents' argument, the language of 28 U.S.C. § 1653 does not give a court discretion to deny an amendment which sets forth a jurisdictional allegation. Section 1653 provides, in pertinent part: "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts."

When the statute states that jurisdictional allegations may be amended, the word "may" applies to the party making the amendment, not to the court. Courts do not amend allegations; the parties do. Thus, Petitioners, under the statute, may decide to amend to state jurisdictional allegations.

Section 106 of the Bankruptcy Code is clearly applicable here and provides jurisdiction for Petitioners' state law claims. Petitioners' previous argument to the contrary, noted by Respondents in their brief, was based on the language of Section 106 at the time of the motion, which language was subsequently amended on October 22, 1994 with retroactive effect. The current version of Section 106 applies to this case and supports jurisdiction.

Petitioners respectfully submit that the Petition should be granted.

Respectfully submitted,

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